110-371

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 209.

JOHN C. VOGEL, EXECUTOR OF RUDOLPH BIRCHER, DECEASED, PLAINTIFF IN ERROR,

vs.

TIMOTHY GRUAZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 30, 1880.

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a UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judges of the Circuit Court of the United States for the Southern District of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between Timothy Gruaz and Rudolph Bircher, a manifest error hath happened, to the great damage of the said Rudolph Bircher, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of
b October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be *done* therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 24th day of August, in the year of our Lord eighteen hundred and eighty, and of our independence the one hundred and fifth year.

[SEAL.] J. A. JONES,
Clerk of U. S. Circuit Court South. Dist. Ills.

(Endorsed:) U. S. Supreme Court. Timothy Gruaz vs. Rudolph Bircher. Writ of error. Filed Aug. 24th, 1880. J. A. Jones, clerk.

c UNITED STATES OF AMERICA, *ss.*

To Timothy Gruaz, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of Illinois, wherein John C. Vogel, executor of estate of Rudolph Bircher, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, district judge of said district and one of the judges of said circuit court, at Springfield, in said district, this 24th day of August, A. D. 1880.

S. H. TREAT.

We hereby accept service of the foregoing citation, this 13th day of September, 1880.

ROBINSON, KNAPP & SHUTT,,
Att'ys for Pl'ff.

(Endorsed:) U. S. Supreme Court. Timothy Gruaz vs. Rudolph Bircher. Citation.

1 Pleas in the Circuit Court of the United States of America for the Southern District of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, judge of the district court of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit, *pro tempore*, sole judge of said court, on Monday, the 16th day of August, at the June term of said court, in the year of our Lord eighteen hundred and eighty, and of our independence the one hundred and fifth year.

J. A. JONES, *Clerk.*

TIMOTHY GRUAZ
5422. *v.* } Trespass on the Case.
RUDOLPH BIRCHER.

SOUTHERN DISTRICT OF ILLINOIS, *ss.*

Be it remembered that heretofore, to wit, on the 1st day of June, in the year our Lord eighteen hundred and seventy-eight, came said defendant and filed in the office of the clerk of said court a transcript of all the papers filed and proceedings thereon had in the Circuit Court of Madison County, Illinois, which transcaipt is in the words and figures following, to wit:

2 *Transcript.*

In Circuit Court, March Term, A. D. 1878.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
MADISON COUNTY.

Placita.

Pleas before the Honorable Wm. H. Snyder, one of the judges of the Third Judicial Circuit of the State of Illinois, and presiding judge of the Circuit Court of Madison County, in the state aforesaid, (said county forming part of said circuit,) and at a term thereof begun and held at the court-house in the city of Edwardsville, in said county, on the third Monday (being the eighteenth day) of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of the said United States the one hundred and second.

Present: Honorable WILLIAM H. SNYDER, *Judge.*
CYRUS L. COOK, *State's Attorney.*
JAMES T. COOPER, *Sheriff.*

Attest: JOHN D. HEISEL, *Clerk.*

Be it remembered, that heretofore, to wit, on the 26th day of February, A. D. 1878, was filed in the clerk's office of said court a præcipe for summons, in words and figures following, to wit:

Præcipe.

In Circuit Court, March Term, A. D. 1878.

STATE OF ILLINOIS, } ss.
MADISON COUNTY, }

TIMOTHY GRUAZ } Case.....
vs. } Dams..... $10,000
RUDOLPH BIRCHER. }

3 The clerk of said court will please issue summons to sheriff of Madison County in the above entitled cause, and oblige

G. B. BURNETT AND
F. W. BURNETT,
Plff's Att'ys.

And afterwards, to wit, on the said 26th day of February, A. D. 1878, was issued out of the clerk's office of said court, and under the seal thereof, a summons in words and figures following, to wit:

STATE OF ILLINOIS, } ss. *Summons.*
MADISON COUNTY, }

The people of the State of Illinois, to the sheriff of Madison County, greeting:

We command you, that you summon Rudolph Bircher to appear before the Circuit Court of Madison County aforesaid, on the first day of the next term of said court, to be holden at the court-house, in the city of Edwardsville, on the third Monday in the month of March, A. D. 1878, to answer unto Timothy Gruaz of a plea of trespass on the case to his damage, ten thousand dollars as he says; and have you then and there this writ.

Witness, John D. Heizel, clerk of said circuit court, and the seal thereof, at Edwardsville, this 26th day of February, in the
4 year of our Lord one thousand eight hundred and seventy-eight.

[L. S.] JOHN D. HEISEL, *Clerk.*

Upon which said summons appears the sheriff's return in the following words and figures, to wit:

STATE OF ILLINOIS, }
MADISON COUNTY. }

I have duly served the within by reading the same to the within-named Rudolph Bircher, this 26th day of Feb., A. D. 1878, as I am therein commanded.

J. T. COOPER, *Sheriff.*

And afterwards, to wit, on the 6th day of March, A. D. 1878, was filed in the clerk's office of said court in said cause, a declaration in words and figures following, to wit:

Declaration.

In Circuit Court, March Term, A. D. 1878.

STATE OF ILLINOIS, } ss.
MADISON COUNTY, }

Timothy Gruaz, the plaintiff in this suit, by G. B. Burnett and F. W. Burnett, his attorneys, complains of Rudolph Bircher, the defendant in this suit, of a plea of trespass on the case; for that whereas the plaintiff, before and and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit, and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this State; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure
5 the plaintiff, and to bring him into public scandal and disgrace, on to wit, on the 15th day of October, A. D. 1877, at the county aforesaid, in a certain discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of those persons, spoke and published of and concerning the plaintiff the false, scandalous, and defamatory words following, that is to say: "He (meaning the plaintiff) is a thief;" "He (meaning the plaintiff) has stolen from me;" "He (meaning the plaintiff) has stolen my money;" "He (meaning the plaintiff) stole from me;" "He (meaning the plaintiff) stole my money;" "He (meaning the plaintiff) has embezzled my money;" "He (meaning the plaintiff) is an embezzler;" "He (meaning the plaintiff) embezzled from me" meaning, thereby to charge the defendant with the crime of larceny.

2d. And, also, for that whereas, afterwards, to wit, on the 15th day of October, A. D. 1877, aforesaid, in the county aforesaid, in a certain other discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the German language, spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, in the said German language, that is to say: "Er hat mir mein
6 geld gestohlen;" "Er hat von mir gestohlen;" "Er ist ein dieb;" which said words signified and meant in the English language, as follows, that is to say: "He (meaning the plaintiff) has stolen my money;" "He (meaning the plaintiff) has stolen from me;" "He (meaning the plaintiff) is a thief," meaning thereby to charge the plaintiff with the crime of larceny.

3d. And for that whereas also the plaintiff before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, exercised and carried on, and still does exercise and carry on, the business of a real estate agent in the town of Highland, in said county; that in the course of said business he was frequently entrusted by the owners of land with the collection of rents due them and with money to pay taxes on land; that in the course of said business he frequently bought and sold real estate as agent for the owner or purchaser, the purchase money passing through his, the plaintiff's, hands; that he has always conducted said business with punctuality in dealing, keeping his engagements, and accounting in a satisfactory manner for all moneys entrusted to his keeping by the owners thereof; and that he was deservedly held in great credit and esteem hy his neighbors and those with whom he had business or dealings in his business of real estate agent, whereby he daily acquired divers gain and emoluments in his said business, to the support and maintenance
7 of himself and his family and the increase of his property.

Yet the defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure and destroy the good name, reputation, and credit of the plaintiff in his said business, and to cause him to be regarded as a person of no credit, as untrustworthy, and not a fit person to be entrusted with the moneys of others in the course of his business, afterwards, to wit, on the 15th day of October, A. D. 1877, at the county aforesaid, in a certain other discourse which the defendant then and there had of and concerning the plaintiff and his said business, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the German language, spoke and published of and concerning the plaintiff and his said business the false, scandalous, malicious, and defamatory words following, in the said German language, that is to say: "Er ist ein Betrüger;" "Er hat mich betrogen;" "der Gruaz, der Betrüger, behaltet mein Geld," which said words signified and meant in the English language as follows, that is to say: "He (meaning the plaintiff) is a cheat;" "He (meaning the plaintiff) is a swindler;" "He (meaning the plaintiff) has cheated me;" "He (meaning the plaintiff) has swindled me;" "He (meaning the plaintiff) is a cheat, a swindler; he keeps my money."

8 By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name and reputation, and brought into public scandal and disgrace; and also been greatly injured in said business of real estate agent; and divers persons who had before the speaking of the said false, scandalous, malicious, and defamatory words by the defendant as aforesaid, been accustomed to deal, and divers other persons who would otherwise have dealt with the plaintiff in his said business, have since that time and wholly on

that account respectively refused to do so, and particularly one Otto Brodtbeck, by reason of the speaking and publishing of the said false, scandalous, malicious, and defamatory words by the defendant as aforesaid, then refused, and thence hitherto has refused to have any dealings or transactions with the plaintiff in his said business, as he, the said Otto Brodtbeck, otherwise might and would have had; and has been and is otherwise injured; to the damage of the plaintiff of ten thousand dollars; wherefore he sues, &c.

By G. B. BURNETT AND
F. W. BURNETT,
his Attys.

And afterwards, to wit, on the 19th day of March, A. D. 1878, being one of the regular days of the March term, A. D. 1878, of said court, an order was made and entered of record by said court in said cause, in words and figures following, to wit:

9 *Leave to Plead.*

TIMOTHY GRUAZ
(4) *vs.* } March 19th, 1878. Trespass on the Case.
RUDOLPH BIRCHER.

On this day time to plead is given defendant until the second Wednesday of the present term of this court.

And afterwards, to wit, on the 26th day of March, A. D. 1878, being also one of the regular days of the March term, A. D. 1878, of said court, a plea was filed in said court in said cause in words and figures following, to wit:

In Circuit Court, March Term, A. D. 1878.

STATE OF ILLINOIS, } *ss.*
MADISON COUNTY, }

RUDOLPH BIRCHER
ats. } Trespass on the Case.
TIMOTHY GRUAZ.

Plea.

And the defendant, by Gillespie and Happy, his attorneys, comes and defends the wrong and injury when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has thereof complained against him; and of this the defendant puts himself upon the country, &c.

GILLESPIE & HAPPY,
his Attorneys.

And afterwards, to wit, on the 8th day of April, A. D. 1878, being one of the regular days of the March term, A. D.
10 1878, of said court, a petition was filed in said court in said cause in words and figures following, to wit:

In the Circuit Court of Madison County, Illinois, March Term, A. D. 1878.

STATE OF ILLINOIS, } ss.
COUNTY OF MADISON, }

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER.

Petition for Removal.

Petition for removal of cause by defendant to the United States Circuit Court for the Southern District of Illinois under the act of Congress of March 3d, A. D. 1875.

To the Honorable William H. Snyder, Judge of the Circuit Court of Madison County, Illinois.

The petition of Rudolph Bircher respectfully shows that he is defendant in this suit, and that the same was brought by said Timothy Gruaz, plaintiff, to the first day of the March term, A. D. 1878, of the said circuit court, held in and for the said county of Madison, in the State of Illinois. And your petitioner further respectfully shows that the said plaintiff claims in the summons in this suit as damages against your petitioner the sum of ten thousand dollars, and that the matter in dispute in this suit, therefore, exceeds the sum of five hundred dollars, exclusive of costs.

11 And your petitioner further respectfully shows that this suit is brought by the said plaintiff against your petitioner in an action of trespass on the case on a charge of slander; and that the said plaintiff was at the time of the institution of said suit, and still is, a citizen of the State of Illinois, and that your petitioner was at said time, and still is, a citizen of the State of Missouri. And your petitioner states that he has made and filed in the said Circuit Court of Madison County, Illinois, the affidavit required in and by said act of the Congress of the United States; and that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in said court, whereof a certified copy is hereto annexed, marked A, which he prays may be taken as part of this petition. And your petitioner further respectfully shows that he is ready and willing to give a bond, with good and sufficient surety, for his doing all acts and things required to be done by the said provisions of law upon the removal of a cause into the circuit court of the United *States*, and he offers and files herewith his bond, executed by himself and George Gist as surety, in the penal sum of two thousand dollars, conditioned that your petitioner shall enter in the next circuit court of the United States, to be held in the city of Springfield, Southern District of Illinois, on the first day of the session of said court,

12 a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court, if the said circuit court shall hold that this suit has been wrongfully or improp-

erly removed thereto, and shall there appear, and shall do all such other appropriate acts as by the said act of Congress approved March 3d, 1875, are required to be done upon the removal of a suit into the United States court, as good and sufficient surety, according to the said provisions of law upon the removal of a suit into the United States court. And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the city of Springfield, Southern District of Illinois, pursuant to the statute of the United States in such case made and provided, and that no further proceeding may be had therein in this court. Your petitioner further states that said cause has not yet been tried, but that the same is pending for trial, and that the term of said Circuit Court of Madison County at which said cause could be first tried is the present term of said court. And your petitioner will ever pray, &c.

R. BIRCHER.

STATE OF MISSOURI, } *ss.*
CITY OF ST. LOUIS, }

Rudolph Bircher, the petitioner in the foregoing petition, being duly sworn, deposes and says that he has read the petition subscribed by him, and knows the contents thereof, and that
13 the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true, and further saith not.

R. BIRCHER.

Subscribed and sworn to this 6th day of April, A. D. 1878, before me, clerk of United States Circuit Court, Eastern District of Missouri. Witness my hand and seal.

[L. S.]

M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

And afterwards, to wit, on the 8th day of April, A. D. 1878, being one of the regular days of the March term, A. D. 1878, of said court, an affidavit was filed in said court in said cause in words and figures following, to wit:

Affidavit for Removal.

In the Circuit Court of said County, March Term, 1878.

STATE OF ILLINOIS, } *ss.*
MADISON COUNTY, }

TIMOTHY GRUAZ *vs.* RUDOLPH BIRCHER. } Affidavit of defendant for removal of cause to U. S. Circuit Court.

Rudolph Bircher, being duly sworn, deposes and says that he is a citizen of the State of Missouri, and resides at St. Louis, in said

State, and is the defendant in the above-entitled action, and that the same was brought on or about the day of , A. D. 1878, in the circuit court for the county of Madison, to be held in the city of Edwardsville, in said county. And this deponent further says that he has reason to believe, does believe, that from prejudice and local influence he will not be able to obtain justice
14 in said court, and thereupon makes this affidavit for the purpose of removing said suit into the Circuit Court of the United States for the Southern District of Illinois, at the city of Springfield, in pursuance of the statute of the United States in such case made and provided, and further saith not.

R. BIRCHER.

STATE OF MISSOURI, } ss.
CITY OF ST. LOUIS, }

Subscribed and sworn to before me, the undersigned clerk of United States Circuit Court, Eastern District of Missouri, this 6th day of April, A. D. 1878. Witness my hand and seal.

[L. S.] M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

And afterwards, to wit, on the same said 8th day of April, A. D. 1878, it being one of the regular days of the March term, A. D. 1878, of said court, a bond was filed in said cause in words and figures following, to wit:

Bond for Removal.

In the Circuit Court of said County, March Term, A. D. 1878.

STATE OF ILLINOIS, } ss.
MADISON COUNTY, }

TIMOTHY GRUAZ }
vs. }
RUDOLPH BIRCHER. }

We, Rudolph Bircher, of the city of St. Louis, State of
15 Missouri, as principal, and George Gist, of St. Louis, in the State of Missouri, as surety, are held and firmly bound unto Timothy Gruaz, of Madison County, Illinois, in the sum of two thousand dollars lawful money of the United States of America, to be paid to the said Timothy Gruaz, his successors or assigns, for which payment well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 6th day of April, A. D. 1878.

Whereas a suit was brought on or about the day of , A. D. 1878, in the circuit for the county of Madison, in the State of Illinois, by the said Timothy Gruaz against said Rudolph Bircher, and the same is now pending in said circuit court

for trial and is removable into the Circuit Court of the United States for the Southern District of Illinois, in the city of Springfied, under the act of Congress approved March 3d, 1875, entitled an act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts and for other purposes.

And whereas the said Rudolph Bircher has filed his petition in said Circuit Court of Madison County, Illinois, for the removal of said suit into the next Circuit Court of the United States, to be held in the city of Springfield, Southern District of Illinois: Now, therefore, the condition of the above obligation is such, that if the above bounden Rudolph Bircher, or his legal representatives, shall enter or cause to be entered in the Circuit Court of the
16 United States for the Southern District of Illinois, on the first day of its stated session next ensuing after the order of the said Circuit Court of Madison County for the removal of said suit into said Circuit Court of the United States, a copy of the record in the said suit, and shall pay all costs that may be awarded by the said circuit court, if the said circuit court shall hold that this suit has been wrongfully or improperly removed thereto, and shall do or couse to be done such other appropriate acts as by the said act of Congress approved March 3d, 1875, are required to be done upon the removal of a suit into the United States court, then the above obligations to be void, otherwise to remain in full force and virtue.

R. BIRCHER. [SEAL.]
GEO. GIST. [SEAL.]

STATE OF MISSOURI, } ss.
CITY OF ST. LOUIS, }

Geo. Gist, the surety in the foregoing obligation named, being duly sworn, deposes and says, that he is a resident of the State of Missouri and a householder therein, and is worth the sum of two thousand dollars over all his just debts and liabilities and exclusive of property exempt by law from execution or attachment.

GEO. GEIST.

Subscribed and sworn to before me, clerk of the United States Circuit Court, East. Dist. Missouri, this 6th day of April, 1878.

[L. S.] M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

17 STATE OF MISSOURI, } ss.
CITY OF ST. LOUIS, }

I certify that on this the 6th day of April, 1878, before me personally appeared Rudolph Bircher and George Gist, to me known to be the persons who subscribed the foregoing instrument in writing,

and acknowledged the same to be their free and voluntary act and deed for the uses and purposes therein mentioned. Given under my hand and seal the day and year above written.

[L. S.] M. M. PRICE, *Clerk.*
By A. P. SELBY, *Deputy.*

And afterwards, to wit, on the 8th day of April, A. D. 1878, being one of the regular days of the March term, A. D. 1878, of said court, a further order was made and entered of record by said court in said cause in words and figures following, to wit:

TIMOTHY GRUAZ
(4) *vs.* } April 8th, 1878. Trespass on the Case.
RUDOLPH BIRCHER.

Order allowing Removal.

Now on this day came the plaintiff, by G. B. Burnett, Esq., and Frank W. Burnett, Esq., his attorneys, and the said defendant by Messrs. Gillespie and Happy, his attorneys; whereupon the defendant, by his attorneys, presents to the court his petition, supported by affidavit, for a removal of this cause to the United States Circuit Court for the Southern District of the State of Illinois; and the court having heard defendant's said petition and affidavit,
18 and having also heard the arguments of counsel thereon, and being sufficiently advised in the premises, and the said defendant having also presented his bond with security as required by law, which said bond is hereby approved by the court and ordered to be filed; it is therefore considered and ordered by the court that this cause be removed for trial to the United States Circuit Court for the Southern District of the State of Illinois, and the clerk of this court is directed to certify the same according to law to said court.

STATE OF ILLINOIS, } *ss.*
MADISON COUNTY. }

I, John D. Heisel, clerk of the Circuit Court within and for Madison County, in said State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record and proceedings in a certain cause lately pending in our said court, on the law side thereof, wherein Timothy Gruaz was plaintiff and Rudolph Bircher was defendant, as truly and completely as the same is now appearing of record and on file in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office in the city of Edwardsville, this 32d day of April, A. D. one thousand eight hundred and seventy-eight.

[L. S.] JOHN D. HEISEL, *Clerk.*

(Endorsed:) Filed June 1st, 1878. J. A. Jones, clerk.

19 And afterwards, to wit, on Friday, the 12th day of July, at the June term of said court, in the year aforesaid, the following proceedings were had in the said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Trespass on the Case.

Continuance.

By an agreement on file this cause is continued at cost of defendant.

It is therefore ordered by the court that the plaintiff recover of the defendant his costs and charges by him about his suit at this term expended, and that execution issue therefor.

20 And afterwards, to wit, on Friday, the 7th day of February, at the January term of said court, in the year of our Lord eighteen hundred and seventy-nine, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER. } Trespass.

Motion to file Cause Bond.

This day comes the defendant, by W. H. H. Russell, Esq., his attorney, and enters his motion for a rule on plaintiff to file security for costs herein.

And afterwards, to wit, on Wednesday, the 26th day of February, at the term and year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH RIRCHER. } Trespass.

Set for Hearing.

By consent of parties by their attorneys, this cause is set for hearing on the 12th day of March next.

And afterwards, to wit, on Wednesday, the 12th day of March, at the term and year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

21 TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER, } Trespass.

Continuance.

On motion of defendant, by Messrs. Gillespie and Happy, his

attorneys, this cause is continued at cost of defendant and set for trial on Wednesday, the 4th day of June next.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the sum of dollars and cents, his costs and charges by him about his suit at this term expended and that execution issue therefor.

And afterwards, to wit, on the 4th day of June, in the year last aforesaid, came said defendant, by his attorneys, and filed in the office of the clerk of said court his demurrer to 3d count in plaintiff's declaration in said cause, which is in the words and figures following, to wit:

United States Circuit Court, Southern Dist. of Illinois.

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER.

Demurrer to 3d Count.

And now comes the defendant and demurs to the 3d count of plaintiff's declaration, and for cause of demurrer says that the matters and things therein set forth are not sufficient in law. Wherefor defendant prays judgment thereon.

GILLESPIE, HAPP & RUSSELL,
Counsel for Deft.

(Endorsed:) Filed June 4th, A. D. 1879. J. A. Jones, clerk.

22 And aftewards, to wit, on Wednesday, the fourth day of June, at the June term of said court, in the year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Trespass.

3d Count Withdrawn and Trial Postponed.

This day comes as well the plaintiff, by Messrs. Robinson, Knapp and Shutt, and George B. Burnett and F. W. Burnett, his attorneys, as the defendant, by Messrs. Gillespie and Happy, his attorneys, and the plaintiff withdraws his 3d count in his declaration, and issue being joined on remaining counts, whereupon comes a jury of good and lawful men, to wit: Philander E. Davis, Joseph McLain, J. N. English, Silvanus Fee, Isaac Hall, Joseph Bodman, J. P. Roberts, F. W. Ludback, Henry W. Baughman, George M. Haynes, Iverson L. Turyman, and F. M. Bolt, duly elected, tried, and sworn to try said issue, and having heard the evidence in part, the further trial of this cause is postponed to to-morrow morning.

And afterwards, to wit, on Thursday, the 5th day of June, at the term and year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Trespass.

23 *Further Trial Postponed.*

This day come again the parties by their attorneys, and also the jury impanelled and sworn herein, who, having heard the remainder of the evidence, the further trial of this cause is postponed to to-morrow morning for argument of counsel.

And afterwards, to wit, on Friday, the 6th day of June, at the term and year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Trespass.

Verdict.

This day come again the parties by their attorneys, and also the jury impanelled and sworn herein, who, having heard argument of counsel and received the instructions of the court, for verdict say: "We, the jury, find the issue for the plaintiff, and that the defendant is guilty of the trespasses in plaintiff's declaration mentioned, and assess plaintiff's damages at the sum of six thousand dollars." Whereupon defendant enters his motion for a new trial herein.

And afterwards, to wit, on the 7th day of June, in the year last aforesaid, came again said defendant and filed in said clerk's office his motion for new trial in said cause, which is in the words and figures following, to wit:

24 Circuit Court of the United States for the Southern District of Illinois, June Term, A. D. 1879.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS. }

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER. }

Motion for New Trial.

And now, on this the fifth day of said term, to wit, the sixth day of June, 1879, comes the said defendant Rudolph Bircher, by his attorneys, and moves the said court for a new trial in said cause, and assigns as causes therefore the following, to wit:

1st. That the court gave improper instructions to the jury on behalf of the plaintiff.

2nd. That the court refused proper instructions asked by the defendant.

3rd. That the court admitted improper evidence on behalf of the plaintiff.

4th. That the court refused proper evidence offered by the defendant.

5th. That the verdict of the jury was contrary to the instructions of the court.

6th. That the jurors misbehaved in considering their verdict.

7th. That the finding of the jury was contrary to law in said case.

8th. That the finding of the jury was contrary to the evidence in said cause.

25 9th. That the finding of the jury was contrary to the law and the evidence in said cause.

10th. And for divers other causes, wherefore this defendant prays this hon. court to award and grant to him a new trial in said cause.

RUSSELL, HAPPY & GILLESPIE,
Attorneys for Defendant.

(Endorsed:) Filed June 7th, A. D. 1879. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 16th day of June, at the term and year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Trespass.

Suggestion of Death.

This day come Messrs. Gillespie and Happy, attorneys for the defendant, and suggest to the court the death of the defendant herein on the 14th day of June inst.

And afterwards, to wit, on th 24th day of June, in the year aforesaid, came said attorneys for the defendant and filed in said clerk's office suggestion of death of defendant, in the words and figures following, to wit:

26 In the Circuit Court of the United States in and for the Southern District of Illinois, June Term, A. D. 1879.

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Slander.

Suggestion of Death of Defendant.

And now comes Joseph Gillespie, and, as an *amicus curias* in the above-entitled cause, respectfully suggests to the court the death of

the above-named defendant, and by way of suggestion would inform the court that the above-named defendant, Rudolph Bircher, departed this life on the fourteenth day of June, A. D. 1879, at his place of residence in the city of St. Louis, and in the State of Missouri; and herewith the said Joseph Gillespie files an affidavit in support of this his suggestion.

J. GILLESPIE.

In the Circuit Court of the United States in and for the Southern District of Illinois, June Term, A. D. 1879.

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Slander.

W. H. H. Russell, being duly sworn upon his oath, says that the above-named defendant, Rudolph Bircher, departed this life
27 on Saturday, the fourteenth day of June, A. D. 1879, at the city of St. Louis, in the State of Missouri, and was buried on the 16th day of June, A. D. 1879.

W. H. H. RUSSELL.

Sworn to and subscribed before me, this 23d day of June, 1879. Witness my hand and the seal of the circuit court, city of St. Louis.

[L. S.] CHAS. F. VOGEL, *Clerk.*

(Endorsed:) Filed June 24th, A. D. 1879. J. A. Jones, clerk.

And afterwards, to wit, on the 12th day of July, in the year aforesaid, comes again the attorney for defendant and file in said clerk's office his motion for an order abating the case, which is in the words and figures following, to wit:

United States Circuit Court, Southern District of Illinois.
June term, A. D. 1879.

TIMOTHY GRUAZ
v.
RUDOLPH BIRCHER. } Slander.

Motion for Order of Abatement.

And now comes W. H. H. Russell, formerly counsel for defendant, and now as *amicus curia*, and moves the court for an order of abatement of the above-entitled cause:

Because of the fact that, since the rendering of the ver-
28 dict in said cause, and before judgment, the defendant has departed this life, to wit, on the 14th day of June, A. D. 1879, thereby abating this case *fastiori*.

W. H. H. RUSSELL,
Amicus Curia.

(Endorsed:) Filed July 12th, 1879. J. A. Jones, clerk.

And afterwards, to wit, on the 16th day of August, in the year of our Lord eighteen hundred and eighty, came said plaintiff, by his attorneys, and files his motion for judgment *nunc pro tunc*, which is in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, } *ss.*

June term, A. D. 1880.

TIMOTHY GRUAZ *v.* RUDOLH BIRCHER. } Case.

Motion for Judgment nunc pro tunc.

And now comes the said plaintiff, by his attorneys, and moves the court for a judgment in his favor against said defendant upon the verdict of the Jury rendered herein and as of record in this court, said judgment to be rendered as of the 7th day of June, A. D. 1879, *nunc pro tunc.*

G. W. BURNETT &
ROBINSON, KNAPP & SHUTT,
Attys. for Plff.

(Endorsed:) Filed August 16th, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 16th day of August, in the
29 year last aforesaid, came again said parties, by their attorneys, and files in said clerk's office defendant's motion for a new trial herein, and also an order abating this suit, which is in the words and figures following, to wit:

TIMOTHY GRUAZ *v.* RUDOLPH BIRCHER. } Case.

Judgment.

Now, on this day came again the parties hereto, by their attorneys, and there came up for decision by the court, the motion of the said defendant for a new trial herein, and also the motion made by his attorneys for an order abating this suit and filed July 12th, 1879, and said motions having been heard by the court, and the court being now sufficiently advised in the premises, doth order and adjudge that said motions be and the same are each overruled; whereupon the said plaintiff, by his attorneys, moves the court for a judgment herein on the verdict of the jury, as entered of record, and to be entered as of the seventh day of June, A. D. 1879, nunc pro tunc.

And it appearing to the court that the verdict of the jury herein was brought into open court on the sixth day of June, A. D. 1879,

and duly entered of record on said day, and whereupon the defendant, by his attorneys, moved the court for a new trial of said cause, and on the seventh day of June, last aforesaid, filed their said
30 motion in writing, and the hearing by the court of said motion was postponed to a then future and convenient day of the said June term, A. D. 1879, of the court, and that pending the hearing of said motion so postponed as aforesaid, the defendant, and on the 14th day of June, last aforesaid, departed this life.

It is therefore ordered and adjudged by the court that the motion by the plaintiff for judgment as aforesaid upon the said verdict of the jury be granted, and that the plaintiff do have and recover of the defendant the sum of six thousand dollars, according to the force and effect of the recovery aforesaid, his damages as aforesaid, assessed and found by the verdict of the jury herein, together with his costs in this behalf expended, and that he have execution therefor.

And it is further ordered and adjudged by the court that this judgment be entered of record as of the seventh day of June, A. D. 1879, and shall become a lien and be in force and effect from and after said day as against said defendant, his heirs, or devisees only, and being the day of the filing by the defendant of his said motion for a new trial herein, and leave is given to the personal representatives of said defendant to present a bill of exceptions herein within sixty days from this date, and to pray for a writ of error to the Supreme Court as they may be advised, and no execution to issue herein until after said sixty days.

31 And afterwards, to wit, on Tuesday, the 24th day of August, at the term and year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

TIMOTHY GRUAZ
v. } Trespass.
RUDOLPH BIRCHER.

Order allowing Writ of Error.

And now, on this 24th day of August, 1880, come again the parties, by their counsel, and it appearing to the court that John C. Vogel was by the last will and testament of Rudolph Bircher appointed executor of his estate, to whom letters testamentary have been issued, and who has entered on the discharge of his duties as such executor; it is therefore ordered by the court, on the motion of said Vogel, that he be allowed a writ of error in this case to the Supreme Court of the United States to operate as a supersedeas, on his entering into bond to the plaintiff in the penalty of $12,000, conditioned as the law directs, with security to be approved by the court.

And afterwards, to wit, on the 24th day of August, in the year

last aforesaid, came said defendant and filed his bond on writ of error in said cause, which is in the words and figures following, to wit:

SUPREME COURT OF THE UNITED STATES, *ss.*

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER. } Trespass on the Case.

Bond on Writ of Error.

32 Know all men by these presents, that we, John C. Vogel, executor of the estate of Rudolph Bircher, deceased, as principal, and John McCreery as surety, are held and firmly bound unto Timothy Gruaz in the penal sum of twelve thousand dollars, to the payment of which well and truly to be made unto the said Timothy Gruaz, his heirs, executors and administrators, we bind ourselves, our and each of our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of August, A. D. 1880.

Whereas the above-named John C. Vogel, executor of the estate of Rudolph Bircher, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the Southern District of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named John C. Vogel, executor aforesaid, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the sams shall be and remain in full force and virtue.

JOHN C. VOGEL, [SEAL.]
Ex'r of the Estate of Rudolph Bircher, deceased. [SEAL.]
JOHN McCREERY. [SEAL.]

Approved:
S. H. TREAT, *Dist. Judge.*

(Endorsed:) Filed August 24th, 1880. J. A. Jones, clerk.

33 And afterwards, to wit, on the 24th day of August, in the year last aforesaid, came the executor of the estate of the defendant, and filed in said clerk's office his bill of exceptions in said cause, which is in the following words, to wit:

In the United States Circuit Court, Southern District of Illinois, June Term, A. D. 1879.

TIMOTHY GRUAZ
vs.
RUDOLPH BIRCHER. } Case.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause

at the June term, A. D. 1879, of said court, the plaintiff to maintain the issue on his part gave in evidence to the jury as follows, to wit:

Boeschenstein.

Charles Boeschenstein, being sworn, testified on the part of the plaintiff: I live in Highland, Madison County, Illinois; am now and have been justice of the peace since November, 1866. Have known Mr. Gruaz about twenty-five years. Have known Dr. Bircher six or eight years. The first time I saw him was at a sale of land at Highland which he intended to buy. I had a conversation with defendant about August, 1877, when he came to Highland to see me. He came there to engage me as his agent.

34 This was about the middle of August; can't remember exactly who was present at that time. Defendant said he wanted me to serve as agent because plaintiff used to be his agent, but he was owing him some money for the rent, and could get no settlement, tried to swindle him out of his rent, out of his money, and so on. He said he was a thief, swindler, and a fraud. He used pretty rough language, of course. I said I was astonished; said at first I would not like to take the agency under such circumstances.

(By the court.) State in full what he said?

Answer. He said he was a thief, fraud, and swindler, and didn't want to pay him what was coming to him.

Question. Give it in German.

Answer. Ein Betrueger—that's a swindler in English. The German in regard to thief is: Er ist ein dieb—that is, thief prevents me from my money. Robs me of what is coming to me from my rents. He talked in the German-Swiss language. We understand each other very well. He said he would sue. Wanted me to go and make a settlement with him, and if he would not pay, he would sue him.

Nothing was said at that time about the penitentiary; that was afterward. Several other times he said something. Said he would sue him in court, and after suing him in civil court he would sue him for embezzling money; would bring him to Joliet. That's what he said. The same words I have testified to were repeated oftentimes. Other witnesses can bring the same thing.

35 He said it as often as we met. At the trial in the county court, in September or October—think about that time—he repeated it again. Think he said so on the witness stand on the day of the trial. He said it altogether two or three, may be, four times. The first time he said it was in August, when he came down to see me, between that time and the trial in the county court. Don't know exactly when that suit took place; he said it to me three or four times. I don't know that any one was present at any of those conversations. Guess Mr. Hadley knows it. He said if

he could get no satisfaction in the civil court he would sue him in the criminal; would report him in the grand jury, and bring him to Joliet; would spend money to punish him.

Question. What did you understand by sending him to Joliet?

Objection by defendant's counsel to witness stating what his understanding was.

By the court. "I think that is not necessary. Spoke of a criminal prosecution and Joliet in connection. Don't think the question is necessary."

Witness. I certainly thought he would try to bring him to the penitentiary for a criminal offense.

Cross-examination.

This conversation was in German mostly. The language used, word for word—well, he called him betrueger. He said that more than a dozen times. Betrueger means a thief; that's what I understood. You might use it for "cheat;" it amounts to the same thing. I don't put my construction on it, but I always un-
36 derstand it that way; always. The next expression in German is, "er ist ein dieb;" translated means, "he is a thief." The next expression in German, being translated into English, is "he swindles me out of my money;" swindling and cheating, it means both words. He said he would put him through by all means, no matter what it cost him. He said he would bring him to the penitentiary. We had several conversations on the same subject; not on the same day. Believe deft. was at Highland twice. I was at his hotel several times. He was at my house, and I was at his hotel in St. Louis.

Question. You understood the doctor to be speaking of him in connection with the management of his property, and in no other sense?

Answer. No, sir; he said as agent; had not accounted for rents; rents he was owing him.

Question. And that is the only sense you understand him as using the terms in which you say he spoke—with respect to the management of his property?

Answer. Yes, sir. I remember Gruaz came to me after that—after the doctor had placed the business in my hands—and paid me money on behalf of the defendant, which I always sent him. Can't tell the exact date of this; the papers will show.

Question. Do you remember what you said to defendant about plaintiff then suing people on accounts that had already been settled.

(Objected to.)

Answer. I said to defendant, I went to plaintiff and wanted him to make a statement, and he said he was not quite ready; would send.

Question. I ask with reference to your saying to defend-
37 ant about plaintiff bringing suits against people after they had paid a debt, or after the power of attorney had been revoked?

(Objected to.)

Answer. I don't remember of any such word that was said at that time; that was something I heard from Mr. Chipron; don't think I told the defendant at that time.

Question. Did you ever tell the defendant in any of the conversations you have spoken of?

(Objected to.)

The Court. All that occurred at any of those conversations may be called out.

Answer. Of course I was astonished that the defendant was using such language; thought it pretty rough.

Question. What did you say about Gruaz bringing suits after his power of attorney was revoked?

Answer. Yes, sir; that's what I said; heard that from other parties about that time; I hear a great many things.

Question. Prior to your becoming defendant's agent, hadn't you heard a general conversation about plaintiff in reference to his dealings with parties for whom he was agent?

(Objected to.)

The court holds: I will allow the witness to state all he communicated; I think that is as far as you are allowed to go now; you may at some other stage of the case be allowed to call in witnesses to show general reputation.

Witness. People say a great many things; I heard these rumors, for Chipron was talking to me; I couldn't remember what I said; a good many things said; been talking a good deal. Of
38 course Gruaz was agent for a good many parties; that's his business.

Question. Didn't you tell Bircher in your conversation that Gruaz had the reputation of doing those things in the administration of estates for which he had been agent?

Witness. I just told what I heard; several things against Gruaz; don't know whether they are true or not; can't tell for how long a time nor how often I had heard those reports.

The Court. State all that was communicated to Bircher.

Question. Did you mention this in each of the conversations you had with Bircher?

Witness. Certainly; we talked the same matter over every time, as often as we met; plaintiff paid me, I think, $25 after I became defendant's agent; in all the conversations I had with defendant with reference to plaintiff, it was with reference to his connection with the management of the property there; I understood him as referring to that, and also that he was trying to get a settlement with plaintiff; that's what he said.

Question. If that word "Betrueger" means "cheat" as well as swindler, why do you give the translation "swindler"?

Witness. Well, you know defendant isn't very particular in the use of words; he uses sometimes pretty rough language, and he knows it himself; he uses words in different ways, not only swindler but thief; uses them things almost every way; the reason I translated it swindler is that I understand it that way.

Re-direct Examination

39 In my statements to Bircher as to what I had heard about Gruaz, I told him who I got it from; I got it from Chipron; several parties in Highland; could not exactly name them; it was about the same time we talked the matter over; it was about the same time as the first conversation; talked the matter over as often as we met; he talked about this matter and nothing else hardly.

Weinheimer.

Henry Weinheimer, being sworn on behalf of the plaintiff, testifies as follows:

(Counsel for defense here moves to exclude the testimony of Charles Boeschenstein in relation to the word "Betruger," alleges to have been used by defendant, for the reason that the only place in plaintiff's declaration where the word is alleged is the 3rd count which was dismissed this morning.)

(The court ruled that when the case is submitted to the jury, the jury can be instructed that they cannot find a verdict, unless some one of the charges is found to be in substance true. They should disregard any not proved.)

Witness. I live in Highland, and have resided there for 25 years. Haven't any particular business now, except to look after my farms and loan money when I have any. I was representative in the legislature one term. Have known plaintiff ever since I came to Highland. Have known Bircher for 35 or 40 years. Knew him when he kept livery stable. He lives in St. Louis, St. Louis County, thirty miles from Highland; the latter place being
40 on the St. Louis, Vandalia and Terre Haute Railroad. Have seen Bircher in Highland not very often. He came off and on for the last few years. I had an idea I could buy his land cheap, and I went over to see him. Struck a conversation with regard to the land; understood he had some trouble with Gruaz about it.

Counsel for defendant object to the witness testifying to conversation with defendant in the State of Missouri.

The court asked if slander is a local action.

Defendant's counsel said: We understand that the statute of Missouri is different from that of Illinois on the subject of slander, and if it was not slander when the language was uttered, it could not be where it was not uttered.

The court overruled the objection and admitted the evidence, to the introduction of which defendant then and there excepted.

Witness. I never had any conversation except in Missouri. It was two years ago in March or April. Asked him if he would sell his land, &c. He then talked about Gruaz having cheated him, owed him rents, and he could not get anything—damned rascal, damned thief—and those words. Was going to sue him. About two months after that I received a letter from Bircher asking me to come over to St. Louis to see him, which I did. He wanted me to take the agency for his land. Of course he abused Gruaz a great deal, but I never said anything about it to any one except to my son-in-law. His exact words were: "Rascal, damned thief, swindler;" talked some German; made the same expressions. He repeated that three or four times during the conversation.
41 I did not communicate that to any one but my son-in-law till about August or September I met Bandelier. The first conversation was in March or April; the second in July or August. I understand Bircher to be wealthy. I don't know this from him. Well, he said, if a man was sick they all wanted to pick at him. I don't know what his wealth is.

Cross-examination.

In each of the conversations I have spoken of we spoke of Mr. Gruaz in the management of Bircher's property, and of his action as agent in renting his farm. The language was partly in English and partly in German. He said he was a damned rascal; a damned thief. This was spoken in English. I was particular telling him not to let Gruaz know anything about our trading together; didn't want him to know anything about it. I went there to buy a farm, and the conversation came up that way. I understood that he was referring to Gruaz in the management of his property there at Highland. I knew that Gruaz was his agent.

Bandelier.

A. F. Bandelier, being duly sworn on the part of plaintiff, testified: I have lived in Highland since 1848; am at present in the bank, where I have been since about 1855; in fact, almost since its foundation have been more or less connected with it. Saw plaintiff first, I believe, in 1850 or 1851, since which time he has lived in Highland. I know doctor Bircher; can't say how long; have seen him off and on at Highland; have seen him when he took no notice of me, because I was too young, and I could not re-
42 call when I did first see him. Had a conversation with Bircher in 1877 somewhere, but the month I can't recollect. I met Bircher at the corner, I believe, of what is called Mr. Henry Myer's liquor store; he solicited a private interview with me; we went across the street to the Eagle Hotel, and there took seats in a corner by ourselves, and Bircher opened conversation, but the exact

words and terms I can't venture to recollect; can't recollect the substance. He complained about Gruaz, whom he had employed as his agent, for attending to the renting of land, stating—at least, that was the substance, it may not have been his proper words—that Mr. Gruaz was not a faithful accountant; that he had actually defrauded him out of money. I believed he used, in German, the word "Betrueger," which doesn't mean fraud, or cheat, or swindler, or thief, but it means all four together; it is exclusively a German word. Bircher asked my opinion about another suitable man to whom he might entrust his affairs. I know nothing, except by reputation, as to Bircher's pecuniary circumstances; I am unable to tell what business doctor Bircher is engaged in.

Cook.

C. L. Cook, being sworn on the part of the plaintiff, testified: I live in Edwardsville, Madison County, Illinois; am state's attorney for that county; I have a slight acquaintance with Bircher; I know Gruaz.

Question. I will ask you if you had any conversation with Doctor Bircher with regard to Gruaz, and, if so, when was it?

43 Counsel for defence asked witness if at that time he was occupying the same position he now holds.

Witness. Yes, sir.

Question. It was communicated to you while you held that position and were acting in that capacity, whatever was communicated to you by Bircher?

Witness. Yes, sir.

(Defendant's counsel object to the witness testifying to matters disclosed to him by the defendant under the circumstances stated on the ground that such communications are to be treated as privileged.)

The Court. I will ask the witness if he regarded it professionally as a privileged communication?

Witness. I had never met defendant before; he was introduced to me by a citizen of our place, and he informed me that he wanted to talk with me with regard to a matter he wanted to bring before the grand jury.

(Objected to.)

The Court. I will allow the witness to state what the doctor said on that occasion. Of course, if he gave the communication to the witness in good faith, there would be no malice about it, and I shall instruct the jury to disregard it.

The objection is overruled, to which ruling of the court the defendant at the time excepted.

Witness. As I stated, I had at that time no acquaintance with defendant whatever. He inquired for the state's attorney, and was introduced to me, and he spoke of his affairs. He said he

44 wanted to bring a matter before the grand jury in regard to Mr. Gruaz. I talked with him in regard to the nature of

matter, and he talked pretty freely in regard to it, and I directed him to the grand jury room. He said a good many things. He was evidently in earnest at the time—expressed himself pretty freely in regard to him; I would not like to swear to the exact words used, or that anybody used at the time. I can give the substance of what he said, I suppose. He wanted to prosecute Gruaz for stealing was the amount of it. I recollect this: he charged him with having stolen his money, and I asked him how, and he told me how it had been done. Gruaz was his agent and handled his funds, rented his farms, and had failed to account for a large amount of money, he told me, and he charged him in this conversation with having stolen his money, and he said he wanted to know if there was any law in this state to prosecute a man for that. I have no objection to state any words. I remember his making the charge that he had stolen his money, but I can't swear that the word thief was used at that time; that it was in substance undoubtedly. My impression is that this was the March term, 1878, of circuit court of Madison county, either that or October term, 1877; my recollection and decided impression is that it was spring term, 1878. Dr. Bircher went into the grand jury room and gave his statement to the grand jury. He was anxious, of course, to have the indictment found, and he evidently believed or so expressed himself.

Counsel for defendant object to witness stating his opinion about what defendant evidently believed.

45 The court. He said he went before the grand jury, and said he seemed to be in earnest in his movements, but he didn't say what took place before the grand jury. Don't know, I suppose.

Witness. No, I don't know.

Cross-Examination

Major Prickett introced Bircher to me; never saw him before in my life. I was certain he came to see me as prosecuting attorney in good faith. That was his business, as he stated it to me. After he made his statement to me I advised him to go before the grand jury; directed him to their room. He went there by my advice. Hold on—I don't say that; I advised him that he had a good case. He came to me and I showed him where the grand jury room was. He stated his case to me as state's attorney. I then directed him where to go, and said I should prosecute it as *as* vigorously as possible, if the indictment was found. In regard to the advice I gave him, I rather encouraged him to drop the thing; I told him he better sue Mr. Gruaz first, and see if he couldn't judgment against him, and so put it in a better shape to prosecute him. He stated his case, and I thought from his statement that he would have few, if any, witnesses besides himself, and that it would be doubtful, however honestly he might believe that he had cause, it would be doubtful whether the grand jury

would bring a bill, so I advised him to bring a civil suit,
46 but, said I, you are here, and you mustn't think hardly of
me if the grand jury don't find a bill, and I directed him to
the grand jury room.

Gruaz.

Timothy Gruaz, being duly sworn in his own behalf, testified as follows: I am the plaintiff; live in Highland, Madison County, Illinois, where I have resided for twenty-nine years and a half. My business is notary public, real estate and insurance agent. Have been notary public since February, 1858; in the real estate for 15 years. I have a family living with me in Highland.

Question. What has been the income from your business prior to 1877?

Defendant's counsel. Have you your books here?

Witness. No, sir.

Counsel for defendant object to this evidence on the ground that the books would be the best evidence.

Objection overruled, and the ruling of the court thereon excepted to.

Witness. I remember it varied from $2500 to $3500 per annum.

Question. What has been your income from your business since 1877 in the spring?

Witness. I don't see no income since 1877, more especially since 1878. My business is in fact in and around Highland entirely gone. As an example, I might have produced the books, and
can produce them anywhere at any time, but in my fire and
47 life insurance business which was very large. I was general
agent for the Brooklyn Life, and also always have some special work for the New York Underwriters, and representing some of the largest companies, and I will state: I have the North British; have steamship agencies and European agencies; collections for parties in Europe; made that a specialty; but, as I was going to state, in my insurance agencies——

The court. Do you want to go into particulars?

Witness. No, sir; where I had a hundred risks have now only ten, may be only eight.

(Objected to by deft's counsel.)

The court. He may state whether he has any income from any source or not; I don't care about his going into it particularly.

Question. In your real estate business; how about that? Just to show your relations, if any, to persons in foreign ports?

Witness. I was representing some heirs in Europe that owned large tracts here, and immediately after those rumors were started, just two months after that rumors came to me that the agency was withdrawn from me, and upon inquiry I found——

(Hearsay statements objected to and objection sustained.)

Question. Now go back five or six years, prior to 1877.

The court. He has stated with regard to his income; you may ask him what it has been since 1877.

Witness. Since 1878 it is practically all gone. The power
48 of attorney from parties in Europe was revoked in December, 1878; I mean in '77. The defendant tried to indict me in 1877, in October, and sued me then. I know the pecuniary circumstances of defendant from a remark he made to me. I had the sale of his land, which he wanted $15,000 for, and he remarked, if you can't sell it, anyhow it is nothing more than a drop in a bucket of water. I saw his assessment in the books at St. Louis, and took the figures of the assessment,

(Defendant's counsel object to this evidence, for the reason that it is immaterial whether the defendant is rich or poor.)

The court. I think the question has gone far enough; as at present advised, I was inclined to allow the plaintiff to prove that the defendant was a man of property, but the extent of his property, whether a hundred thousand or twenty thousand, I don't think is material; I will reserve the question for instruction hereafter.

Question. State whether Bircher is a wealthy man?

Witness. He is a very wealthy man.

The court. I think you have gone far enough.

Cross-Examination.

In 1870, I represented the New York Underwriter's Insurance Company, the Home of New York, the American Central of St. Louis, and the Brooklyn Life, I think; I have represented some companies that I dropped afterward, and I am trying to recall the names; I can't recollect any others without looking at my books, just now; I did not represent them by power of attorney; in
49 1871 I represented those companies; in '72 the same, and some more; in '74 the same, '75 the same, '76 the same; 1877 I was not representing those companies by power of attorney, but by commission; in addition to those named, I represented in 1877, the Phœnix, of Brooklyn, the Niagara, of New York, and I represented for a while the Franklin, of Philadelphia; but they withdrew their agency in 1876, I think; in 1877 I represented the companies I have mentioned, and I still represent them; not one of those companies has withdrawn its business; in August, 1877, I represented several steamship companies—the Cunard line, the Inman line, the National line, the Red Star line, the American line, the Hamburg line—that's all; I still represent them; they have not withdrawn their agencies. In August, 1877, I represented the Brooklyn Life; of other life insurance companies, I represented the Illinois Benevolent Association; it is a kind of life association. I represented no other life insurance company; I still represent them; they have not withdrawn their business from me. Those were the only corporations or institutions I was representing in 1877, and more of

them have withdrawn their business from me; I can cite hundreds of persons who have withdrawn their business from me since August, 1877; I will mention the Swilkenborg's of Switzerland; that business was withdrawn in December, 1877; you can
50 see it on the record; the power of attorney was put on record and withdrawn by an act that was recorded; it was done by Mrs. Launderer, the only daughter of old man Swilkenborg; she lives in Geneva, Switzerland; she was not here at the time; I never saw her. I was never served with a notice of the revocation of my power of attorney; I continued to represent them until I was notified that the power was revoked, as late as July, 1878; that was the first knowledge I had of the revocation of my agency. I can give you the name of a number of parties who took their business from me. John Schule was one; he lives at Highland; he has no special business; is a man of means. I transacted business for him for a number of years—'75, '76, '77. The nature of this business was, I insured his house in the American Central Company in the years I have mentioned. He dropped his policy in the beginning of 1878; that is, he wouldn't insure with me; that was the only business I had with him; I don't know whether he insured in another company. John Doetiger was another party who withdrew his business; he is a saloon and hotel-keeper; he insured with me as long as I can recollect up to 1878 in the New York Uuderwriters Agency. He insured with another agent in another company; I saw the policy. The amount of my commission on his policy was five or six dollars yearly. He
51 dropped his policy in the spring of 1878. Another man, named Dornbeck, took his business from me; he lives at Highland, and runs a brick-yard, and also a boarding-house; he dropped his insurance, and insured in another concern; he dropped it in 1878. I represent said companies yet, try to do business, but I am losing my business. I didn't say I had not taken out any policies for those companies since 1878; I am losing my business in those companies, and not on account of the hard times, either, for I know who took eighty policies the same year. I should say that from 75 to 100 policies of insurance were dropped with me since 1877. I state that I still represent those companies, and have lost that many policies, not from the hardness of the times, decline in property, nor from any preference for other agents at all. I didn't say that one of them had a preference for another agent. I said another firm had insured eighty risks in the meantime, in different insurance companies at about the usual rate. That firm was Eagan & Balsecker, at Highland. Those are insured in the Highland Mutual, a local company. I don't know when it started exactly. I think their authority to do business has been withdrawn; know it in fact; withdrawn since January, '79. That was a local home company. There is another one. The Turner Hall is another instance wherein I have represented parties that have dropped off

since 1877; I mean dropped the risk—fire risk. Also Mr.
32 Mosonia, also a fire risk. Life risks too have been dropped.
Mr. Bandelier, that was here, dropped his policy, whereby I lost the insurance on his life. I don't know; didn't ask him if he dropped that policy on account of what deft. said.

I am the oldest notary in town; and I have also an abstract office, the only one in town of Highland, and I am a conveyancer. Have a clerk reporting from the clerk's office all the conveyances that are rendered there from the town of Highland. In conveyancing, I find in making my abstracts, that out of sixty deeds referring to lots in the town of Highland in the first three months—three or four months of 1878 and later part of '77—out of sixty-eight deeds recorded, eight were made by me, only eight, and, out of those eight, I think three or four were where my family or myself were personally concerned. Before that time the circuit clerk used to say that my business was by far the largest.

Question. Was your stepson, Adolph Reugger, in your office in 1877?

Witness. Yes, sir; till in November of that year he was elected county treasurer. He was not the clerk I mentioned that I employed in the recorder's office at Edwardsville. My stepson, Adolph Reugger, was clerk in my office at Highland till he left it in November, 1877. After he left my office my business did not
53 fall off, it fell off before, from August, '77, from the moment defendant came to Highland and made such reports about me. From the very moment he put a notice in the paper worded—I have it here. This is in German. Translated, is this:

"Take notice, that Timothy Gruaz is no longer my agent; that my farm therefore can no longer be rented from him, and moneys are no longer to be paid to him.

"DOCTOR RUDOLPH BIRCHER."

That is the only printed publication that defendant made *made* with reference to myself. If that had been alone, it would not have amounted to much, except, that every body would be astonished that he named no other agent to attend to his business for him. He had another agent there, but he did not give notice to parties who to pay to. I recognize this paper (exhibited). It is in my handwriting all except the date, that was put in afterwards. That paper was produced in the suit when Bircher sued me. I don't recollect when I delivered it to Bircher, it was prior to '77. He came to my office, and he used to be exceedingly kind with me—gushing—telling me all about his business; asked me once in a while for a statement, and I would give it to him; never had any trouble with him; have given him other statements, as often as it was asked, not as general as that, because that's a statement of how the whole half section had been rented.
54 I don't know that the doctor had been writing to me endeavoring to get a statement, and had to go over there, and

when he came there I gave him this. No, sir; the statement was given him a year before he was dunning me for the rent in 1877, in July or August. This was rendered in August or July, '76, probably earlier. I did not put the date down. It may be as well between March and June as not. That's a statement as to 1875; how the whole was rented, to whom and for what amount. There is a statement of 1876, to whom rented, how many acres, and for what amount. I had notes from all these parties due on the first of December. I don't know as a matter of fact that defendant had been endeavoring to get from me the money represented in this statement up till '78, nor till the time he brought the civil suit; no, sir; I paid over and accounted to him for all moneys represented in this statement before 1877, all except one note. That is a statement of notes taken for rent, not a statement of moneys. One of those parties dying, Smoker, you see there, died, I think, sometime in '76, and when that note became due I had to collect it from the securities—took secured notes. The securities were considered perfectly good, but had moved to Bond County in the meantime. I have the account here as to when I paid the $1,095 as represented on this paper. It was presented in the civil suit, every payment, every draft, and the defendant Bircher swore point blank that he never received them till we showed them to him. I got only fifty letters from him. Here are the drafts. Here is one, 20th February, '76. The rents of '75 were due on the first of
55 December, '75, and those notes were due on that day and could not be collected before they were due. There is one of those payments; there is another one 9th December, '76, $118; here is another one 1st December, '76, $51.40. Here is another the 6th December, '76. There is another the 3d April, '77, $318. That's the rent of '76. There is another 18th January, $240.45. There is another Aug. 22d, '77, $78.25. There is another the 29th of May, '76, $270.80; there is another December, '75, $502.60. There is another 14th January, $754.35. Now it goes further back into '74, and you don't want that. I have all represented here. I presume, also, the taxes, amounting in two years to $400, or something like that. There was one check which does not bear his signature; you have it there. The defendant swore point blank he did not receive it. It has been sent to the cashier; let him swear that he never got that money if he pleases. We can prove to him. I paid the first of March, '77, $422.25, taxes and the insurance, and for the rents of '76.

Question. I wanted to get through with the rents of 1875?

Witness. Just suit yourself. Had those drafts; that account has been paid. The $1,096. He sued me for a $1,000 and I produced payments for $1,200 that he had given me no credit for. I didn't ask for any balance or counter claim. I didn't claim it; it was his, not mine. It was his fault if he did not keep his books right. He claimed only $1,000, while I paid $1,200 at that time. Here

are the checks for the rent of '75. I had a conversation after that with Bircher. After the suit was over he came to me and said, I see now I was wrong; acknowledged he was wrong entirely
56 and offered to make it all right if I would withdraw this suit, but he had bagged me for six months trying to indict me, and postponing the trial, and giving me no chance to show that I had paid everything; but in the meanwhile everybody knew he was suing me, and that he was calling me a thief, and misrepresenting me as a thief. Everybody in a little place like Highland knows, except the babies probably. It has a population of about 2,200. I presume not very hard to suppose. I did not say that every one heard Bircher call me a thief. After the trial was over the defendant came to me and said he would like to make it all right if I would only withdraw the suit. Said that he acknowledged that he had been wrong; was very sorry for it. I answered that he might try his best, but there were two things that he knew he never could do, and that was to give me my good name and give my wife the health he had destroyed at the time. (Defendant's counsel objects to statements of witness regarding his wife's health, there being nothing in the declaration of that kind.) I was so sure of my innocence and of the justice of my cause that I had everything prepared at the time. He had been six months with his suit hanging over me like a cloud. My friends did not know me any more; would hardly speak to me. I don't say it was simply because the defendant had sued me for $1,000. My friends deserted me because of his efforts to indict me and the suit against me; also his expressions among the people of Highlands among his own
57 countrymen. He has several there, because of his being a very wealthy man, having large influence among his own countrymen. I did not say my friends deserted me; I said they would hardly speak to me—most of my friends. I could not exactly give you a list of those who would not speak to me, just now. I said the whole thing was hanging over me and ruining me.

Question. Will you give a single instance other than you have mentioned wherein you have lost anything by reason of those words alleged to have been spoken by Bircher?

Witness. I think I have spent over a thousand dollars. I have had my wife in the hospital under medical treatment just on account of the doctor's remarks.

Question. I am asking you for facts?

Witness. That is a fact; I presume that is law. I believe I can give you an instance where I have lost business because of the alleged speaking of those words. I told you I could give you a great many names of business risks, fire and life risks that I lost because of that. I know it because I know it. Ask me how I know you. I have seen that; have seen it dwindle in my business. I knew it and felt it all the time. I believe they all withdrew their business from me because of the alleged speaking of that language.

I gave you several persons or corporations that withdrew business from me on that account. Do you want more? No person or corporation said to me they had withdrawn business from me on account of the alleged speaking of those words. I knew
58 nobody would do that, but I have been insulted on the street by business men and called a thief publicly in consequence of this Bircher affair. There is Mr. P. C. Chipron did after that affair. I know Gleyre, of East St. Louis. He never called me a thief in a public place in Highland. Never was so called by any one till after this affair. My honor had never been questioned in any form in Highland prior to August, '77. Don't know what some people may have talked behind the door; to my knowledge never before August, 1877. I don't know that it had been rumored about Highland for years that I had not been honest and fair in my dealings. Nothing said about the dealings of myself with Mr. John R. Blattner. Think he tried to sue me for a little of a debt.

(Plaintiff's counsel objected that this testimony had nothing to do with the case.)

The court. It is perhaps carried to an extreme. The plaintiff attempted to prove that he had lost business in consequence of this charge being made. They may show that he hasn't lost business; anything that tends to show that.

Witness. I think everybody was satisfied, and if the doctor had kept books, he would be. I had no commercial agency; never had any. Am collecting for all that send to me. No notes were taken away from me prior to that time that I recollect. I will not say that the insurance business, of which I have spoken, was not taken from me on account of the organization of the Home Company; it might be a fact to a certain extent. Helped that company to get a little more risk, but another firm took a great deal of risk,
59 Hartford-Milwaukee. I don't know of my own knowledge who organized the Home Company. Think Egan & Belsecker. I think it was organized under the state law, county insurance companies. Herman & Company, steam millers at Highland, I believe took their business from me because of the notification in the Highland Union and the language used by Bircher. I think so because, prior to that time, they used to give me a great deal of business, and since then they don't do any business with me. They never told me why they quit me. It is not my inference; it is a matter of conviction. It is my firm belief. I think so because they do less business with me than formerly. No one would tell me that he quit for that reason. It is a delicate matter. Several parties have told me that others quit on that account. There is the Swilkenborg party that I mentioned, at Basle, Switzerland. That was because of these rumors. The lady's agent wrote to me. He is her son-in-law, and is the head and tail of the house of Swilkenborg, being the husband of the only child of the family. I have

told you that nobody except this man ever told me they withdrew their business on that account. He wrote me two letters; here is one, dated 1870, and here is another, dated 1878. Those are the only two documents I possess from any person showing that they have withdrawn—any person or corporation—has withdrawn or withheld business from me on account of that language. It is a very delicate matter.

Question. Please answer. I will if you will give me time. It is a very delicate matter for parties that have dealt for a number of years.

60 The court. Let me me make a statement:

I understand him to state this is the only person who ever informed him by letter or otherwise of their withdrawal of business on account of this language.

Witness. This is the only one I recollect.

Re-direct Examination.

This is not on account of my business; it is a statement of the manner in which the half section was rented to whom and for how much for the '75 and '76; it is one of the several statements I made defendant; to whom, whenever he asked it, I immediately made a statement; at the time these words were said to have been spoken; I had in money in my hands belonging to defendant; there was in process of collection, which was subsequehtly paid to him the moment I was called upon by a person representing himself as his agent; I hadn't time; wanted to show him the account; he pretended he didn't know anything, or care anything about it; then I made him a whole statement, and handed him over all the notes I had; then there was a little matter in process of collection; I knew the forty in Europe got notice of the publication in the Highland Union through the correspondence of Doctor Walaser; I did not see it sent.

Re-cross Examination.

I am positive I accounted to Bircher for the year 1876 for all moneys received by me from the lands and tenements in Madison County, belonging to him, of which I had charge; my fam-

61 ily consists of my wife and five children of hers; I have no children of my own; three of these children are grown; the youngest are twelve and seventeen years old—both boys; I was married 8th June, 1872; up to that time I was a bachelor; I have also, if it would interest you, an old father to support; he is now 82 years old.

Osthoff.

The plaintiff then read a portion of the deposition of Albert Osthoff, taken at Edwardsville, Illinois, on the part of plaintiff, on the 24th day of March, 1879, as follows, viz:

My name is Albert Osthoff; age, 34 years; reside in Highland; occupation, hotel keeper; have lived in Highland since 1866 to the present time, except one year in 1868, in St. Jacobs, and one year from 1872 to 1873, in Lawrence, Kansas; Highland claims a population of 2,200, composed of German and Swiss descent principally; I know the parties to this suit; have known Gruaz since 1861, and have known Bircher at sight about that long; Gruaz is in the real estate, insurance, land, and collecting business; I know that he was the agent of Dr. Bircher about four years ago, and am under the impression he was agent a long time before; know he was agent till last summer, a year ago, late in summer; about that time there was a notice in the Highland Union that Dr. Bircher had withdrawn the agency from Gruaz, and he was not authorized to collect any money for him; the reports purporting to come from Bircher, from what I could hear from the people, had a dam-
62 aging effect upon the reputation and business of Gruaz; I have opportunity to hear expression of opinion, being keeper of a public house, and frequently heard it discussed by all classes of men.

(This was objected to.)

Dr. Bircher keeps the Laclede Hotel in St. Louis, and is a large real estate owner at Highland; he is reported as a very rich man. Three or four years ago Dr. Bircher and Gruaz were at my house; conversation turned to his opulence and condition, and I understood him to say that he was the owner of the Laclede Bircher Hotel, Everett House, Bircher Building, and a number of houses in St. Louis, and also a farm near St. Louis. I know he owns 320 acres near Highland, Ills., which he refused $12,000 for. From what Dr. Bircher stated to me, and what I know of his circumstances from all I know, he is reported away in the hundred thousands; don't know what he is worth. I don't know that the Laclede Hotel is worth half a million. In regard to how often Bircher visited Highland, and how well known he was, I can only speak as to late years. Should say I saw him there about twice a year. He is known to all our old settlers, be a countrymen of most of them. In former years he was there often buying horses. He came to this country with one of our oldest citizens, Mr. Blattner. So far as I know, Gruaz seemed to be busy, and had a good many people frequenting his office. His business was injured greatly.

Cross-examination.

63 I have not examined Gruaz's books to see the extent of his business know that he keeps a cash book and ledger.

Counsel for defendant then moved the court to exclude from the jury that part of the deposition of the witness Osthoff relating to Bircher's property.

The court. I will reserve that question.

The plaintiff introduced and read to the jury the deposition of

Dr. Charles Walliser, taken at Highland, Illinois, March 10th, 1879, as follows, viz:

Walliser.

My name is Dr. Charles Walliser, age, 28 years; business, physician; residence, Highland, Illinois. Before coming to Highland I lived in Basle, Switzerland. Have known Gruaz since my arrival here, and Bircher one month; saw him first in Springfield, Illinois. I knew the heirs of Zwilehenbart, and that they owned real estate near Highland, Illinois, before I left Basle. I learned from Charles Imobersteg, one of the heirs, that Gruaz was their agent in Highland, and asked me to see about their interests when I came here. Charles Imobersteg is the chief of the house of Zwilehenbort or manager in Basle, and I knew him about two or three years before I left Basle. He was a student with me. When I came to Highland I wrote to Imobersteg what I had heard about Gruaz. The cause of my writing was what I heard, reports and rumors in Highland about Gruaz,
64 that he did not pay over moneys collected for rent, and an article read in the Highland Union. I do not exactly remember the contents of that article, but I read in the paper that Gruaz had swindled Dr. Reed Bircher, of St. Louis, but I cannot remember all, or whether I saw Bircher's name signed to said article; I heard the rumors several weeks before the article appeared in the "Highland Union." Think it was in the year 1877; in the fall I heard that Gruaz did not pay over moneys collected. I believe the rumors I heard referred to Bircher. It was in consequence of the rumors and the article in the paper that I wrote to Imobersteg. I do not know very well, but I think the reason the agency for the Swillenbort heirs was taken from Gruaz was on account of my communication Imobersteg. I afterward heard that the agency was revoked. It was spoken of sending the article which appeared in the paper to Imobersteg, but I do not know whether it was or not; nor do I know how much property the Swillenbort heirs own in this country of which Gruaz was agent.

Cross-examination.

Think it was about one year after I came to Highland that I first heard those rumors about Gruaz. Heard that Gruaz has not delivered money by him collected. That was a general rumor; I do not know the fact of my own knowledge, or from investigation or rumor, that Gruaz did not account for moneys collected by him for the Zwillenbort heirs. I had correspondence with the agent
65 at Basle about Gruaz agency or collectious of money belonging to the estate in Highland, Madison County, Ills., after the rumors and article appeared in the paper. Have not the letters from Basle referring to that matter. Think I burned them up. Don't remember that I received more than one letter referring to the matter. I did not take charge of the land here; John Blatt-

ner did. Gruaz turned over no papers nor said anything to me about the matter. The rumors testified to by me in my examination-in-chief as having been heard about several weeks before the article in the paper, I heard several times and were generally discussed among my acquaintances. In those discussions other names than Gruaz was mentioned, but I don't remember them I was new in the community. Don't know how they came to speak of Gruaz. They were people living in Highland and neighborhood. I was not enquiring then about the character and reputation of Gruaz in respect to honesty and fair dealing with the people. I had not time to make investigations. I do not remember whether his reputation was good in that respect or not. I believed they said Gruaz had swindled some one. I cannot say that it was a general rumor that Gruaz, as agent for people and land owners, was in the habit of collecting moneys for people and not accounting for the same; I have heard those rumors after I had been here some time; can't say what his general reputation is in Highland and the neighborhood in that respect. That article which I spoke of was not simply a notice to the tenants in this county not to pay over any money to Gruaz, that he was no longer Bircher's agent,

66 I thought it was rather an accusation than a notice. I did not advise Imobersteg to withdraw his business from Gruaz. I believe I state the facts; told him the rumors and the contents of the article, and wrote him to do what he thought best. Am practicing generally in Highland and neighborhood; have quite an extensive practice. I know of no other person having withdrawn business from Gruaz since I have been here. Can not remember to have heard of it. I do not know how Imobersteg happened to ask me to look after his interests when I came to Highland. He recommended me as a friend to Gruaz by a letter of introduction. After I heard these rumors and saw the notice in the paper, I, as a friend of Mr. Imobersteg, wrote him what I had heard and saw. He afterwards wrote me that John Blattner was his agent. I do not remember that he said anything in that letter about Gruaz. I did not show the letter to Gruaz. Can't remember whether I received more than one letter.

Re-examination.

I heard no remarks derogatory to the character of Gruaz till several weeks before the article appeared in the paper; prior to that time I had dealings with him as a friend, and when the article appeared I left him. I was introduced to Dr. Bircher only for one moment in St. Louis, and afterward I met him at Springfield, but he did not remember me. This was the 13th day of February, 1879, when I was there as a witness in this case.

Question. State whether or not Bircher attempted by any means to influence your testimony in this case, and if so, state

67 in detail all the circumstances attending such attempts.

Witness. When the train was approaching East St. Louis

he came in the last car but one. He invited me to stay at his hotel with him in St. Louis. Said he would show me some medical books which he retained from a physician who had not paid his board. I objected. Wanted to go to another hotel, but he insisted of me, and then I told him I would catch a freight train in East St. Louis to Highland. He then insisted to persuade me to go with him to his hotel. Would not leave me. Then I went in the last car. Then, at East St. Louis, he went on the platform to see whether I leave the train or not, and I knew there was no other train, and in order to avoid him I hide myself behind the stove. At Main street depot I intended to leave the train; went on the platform and there stood Bircher again, and then I jumped off on the other side. After that I saw him no more. He only invited me to stay at his hotel, and told me he would sell me the books very cheap. I told him to send me a list of the books, but he never sent me one. I avoided Bircher because he was very tiresome, and I did not like to be questioned about this suit.

Re-cross Examination.

I never had any business or collection with Gruaz for myself, except that Imobersteg loaned me some money and I got it of Gruaz. He is now my collector of physician's bills.

Re-direct: Gruaz became my collector late in the fall
68 of 1878. I was prevented from employing Gruaz as my collector by the reports and notice in the paper until after the suit of Bircher vs. Gruaz was decided in favor of the latter. I was about to have him to collect my first fee bills when I heard and read the article. Having heard that Gruaz beat Birchler in the suit in Edwardsville, I changed my mind and employed Gruaz.

The plaintiff introduced and read to the jury in his own behalf the deposition of John S. Hoerner, taken at the same time and place as that of Dr. Charles Walliser, as follows, viz:

Hoerner.

My name is John S. Hoerner. I reside and publish the Highland Union in Highland, Illinois. Have published said paper more than four years. In Aug., 1877, the paper had a circulation of about 800 copies weekly. It is printed in the German language, and circulated generally in Highland and vicinity, where most of the inhabitants are German speaking. It is the only paper in Highland.

(Witness is here shown a copy of said paper, dated August 31st,
1877, and his attention called to an advertisement therein
69 contained, and purporting to be for Dr. Rudolph Bircher.)

Question. State how that advertisement came to be published.

Witness. Dr. Bircher came to my office about that time and dictated the advertisement to me as it appears in the paper. It is in-

serted and published in the paper one issue by the direction of Bircher.

(All the above testimony objected to.)

Cross-examination.

Question. Will you please give a literal translation of the notice.

Answer. "Notice is given that Mr. Timothy Gruaz is no longer agent for me. My farm can, therefore, no longer be rented from him, and moneys for me are not any more to be paid to him. Dr. Rud. Bircher."

And thereupon the plaintiff rested his case.

And the defendant, to maintain the issue on his part, gave in evidence to the jury the following evidence, viz., that is to say:

Bircher.

Rudolph Bircher, being duly sworn in his own behalf, tes-
70 tifies as follows: My name is Rudolph Bircher; am 70 years old this fall; reside in St. Louis, where I have lived since '36. I am the owner of a piece *of a piece* of real estate, 320 acres, near Highland. Have owned that since 1868. I bought it for some kin-folks of mine; thought they had money, but they hadn't, so I had to keep it. In 1873, to the best of my recollection, I employed Timothy Gruaz to act as my agent. He continued to act for me till 26th August, 1876, when I put a notice in the paper notifying all tenants not to pay any more money to him on my account. His duties as agent were to lease the land, and collect the rent, and also to pay taxes. I let him insure the two small houses on it. I could never get a full settlement out of the gentleman till June, '76, when I went to his office, and said, now, I want a settlement of how we stand, and the statement is here on file. That is the paper. He wrote it out in my presence and gave it to me. That was the first settlement he made with me. He had made statements before, when he would send me money, but never a settlement that I took to be a settlement.

71 I said I want to know the amount of money coming to me, and this is what he wrote down. June 17th, '76, I called upon him for a settlement, and this paper is what he gave showing how the business stood. Since that time he has paid some money on it, for which I gave him credit. I had written him a good many times I would like to have things settled up. Before going to the printing office I called to see Gruaz, but he was gone over to Edwardsville. I commenced a suit in Edwardsville for the balance due me, and used this statement to get at that balance. In addition to my claim against Gruaz for money not paid over, I had blamed him for allowing two years of taxes to accumulate on the land before paying them. I told Cook I thought I had been greatly wronged, and would like to bring the matter before the grand jury. I consulted with Mr. Cook the same as if I came to you for advice on account

of his being introduced to me as prosecuting attorney. In the statements I made in the presence of the gentlemen who have
72 testified concerning the language used, that is the very word I spoke, "betrueger;" he swindled me with regard to my money.

Mr. Robinson. You said he stole it.

Witness. That's just the same—swindling of my money.

Cross-examination

The only objection I had to Gruaz was that he took my money and kept it; might just as well say stole it—just as good. Gruaz did not frequently render statements; never except that he told me that money was due to me when he gave me that statement—told me money was due to me. I have not Hofner's note; he proved on the trial that it was in some one else's hands, and for $60. I brought suit for all I claimed Gruaz had in his hands. I didn't take my books any more after his statement; I went by that. I haven't received any of the money mentioned in this $161 check. They palmed off another $500 check on me. There were some of these checks introduced on that trial; don't know what all. I was prohibited even to look at them; pretty well bull-dozed.
73 That was in Judge Dale's court. The court did not bull-doze me, but your brother did. I did not use the terms thief. It may be so that Gruaz proved on that trial to the satisfaction of the court that he had paid me all the money he owed me. I did not say on that trial that I was mistaken about his owing me; I said I was mistaken about that tax receipt; we can settle that without any further law-suit. I received the money; I couldn't deny that. I didn't deny receiving it altogether on that trial; never deny anything my handwriting is to. I denied having received one check there. As to all those checks I did not deny receiving the money; I did deny having received the money as to a $500 and some odd dollars they put in. I did not deny having received the money; did not receive it on that account. I don't deny having received the money on all those checks. That one for $161.50 payable to H. H. Wernse I did not get to my knowledge. I don't know whether I got it; don't believe I did. Those other checks I don't deny receiving, although not on that account. I did not receive it; I don't know; if I did I would see my name on it. I never
74 received any money from Gruaz on any other account *that* the rent account. The reason I say these checks were not received on that account is because they are of a prior date, for years before '76. That date in statement is in my clerk's handwriting. When I got back I told my clerk to put down the date when I was over there; his name is Charley Wilcox. I can't recollect that I got that money from Gruaz. Of course if I had I would have signed the check and given him credit; did not give him credit for that as I know of. After I got that statement I laid my books

aside and took his statement; have not to my knowledge given him credit for the $161, and don't believe I need to either.

Question. Mr. Bircher: Here is a check drawn by Mr. Gruaz, February 23d, 1876; this other is dated February 28th, 1876, Highland, Illinois, pay to Dr. R. Bircher one hundred and sixty-one dollars and eighty-one cents. I will ask you if you got that money?

Witness. My name is on that check; that money I got; that comes through the North St. Louis Savings' Association;
75 H. F. Wernse is cashier; should not wonder if I did give Gruaz credit for that check; can't tell you whether that check was put into the bank and sent to Highland for collection, and this draft sent to pay that other; that, I can say I got; there is five days' difference; it may be this check was put in the bank at St. Louis and they sent it to Highland, and the Highland bank on receipt of this sent their check for the amount; that is a question I can't answer, whether I gave Gruaz credit for it, because I haven't my books here; I didn't swear on that in the county court that I never received $161.80; it looks like I got it—that draft—in substitute of it; I expect he got credit for that, but that's prior to the statement he gave me; I did not have any books in the county court; had an abstract from what he paid me that day, but that's prior to that date and has nothing to do with his statement, nor had it anything to do with the judgment; I don't recollect that I ever used the words to Boeschenstein that I in-
76 tended to put Gruaz in the penitentiary, as he was stealing my money; I expected to have him punished, but the penitentiary, I don't believe, was ever spoken of.

Re-direct Examination.

The statement Gruaz made was in June, 1876, and these checks being prior to that date, I considered outside.

Re-cross Examination.

There was not a big argument made in the county court when Gruaz swore bravely he didn't owe me anything and I swore he did; that was the last; that is an account from the time the statement was given to me by Gruaz and the credits given afterwards; that's what it is, made out by my collector.

Blattner.

John R. Blattner, sworn on the part of the defendant, testified as follows:

Have known Gruaz about as long as he is in Highland.

Question. Are you acquainted with the reputation of Gruaz for honesty and fair dealing?

Witness. I can't say that he has got a good reputation.

77 The court. Not what you think of him, but what is generally said of him.

Witness. There is different talk; some talk that way and some the other. It is good and it is bad. That is about the answer I can give. His friends say good, and them that he overruled I believe are against him.

The court. Repeat the last remark.

Witness. I have forgotten.

Question. In regard to his reputation, what the people say in reference to him?

Witness. I believe them he overruled don't think so—overruled. That's if you been beaten from a man once, you don't let him catch you again. I say that I never want to have anything to do with him.

Cross-examination.

Question. You and Gruaz had some trouble once. You and he are not very good friends?

Witness. We have been.

Question. What you have heard about Gruaz has deen in the last two years, hasn't it?

Witness. No, sir; as long as I came back.

78 Question. What is your business?

Witness. He got insurance.

Question. What is your business?

Witness. Eating and drinking.

Re-direct Examination.

I used to be postmaster in Highland.

Chipron.

P. C. Chipron, being duly sworn on the part of the defendant, testified as follows:

I reside at Highland, and have lived there 30 years. I have known Gruaz for over 20 years. I know his reputation for honesty and fair dealing in that community; it was bad prior to 1877.

Cross-Examination.

Gruaz and I had no difficulty that I know of; we were not friendly; I can't be.

Re-Direct.

Just state whose handwriting that is?

Witness. Mr. Gruaz's.

Question. His receipt—what is it for?

Witness. There was a man named Ysabet renting land from Bircher through Gruaz, and mortgaged his personal property;

79 was about to foreclose the mortgage, if I don't mistake, on the 6th of August, 1876. Gruaz told me the landlord's lien was ahead of me. I told him not; my mortgage was due

and I was going to sell. Gruaz then told me to go ahead and sell all the corn and give him the proceeds for the rent. We sold every thing turned out to Gruaz. I sold the mortgage and three loads of corn—65, 25. That's the corn, and the balance of the sale was stock turned over to Gruaz; balance of the rent was paid by somebody else—by Mr. Relt, $112.25. That is the receipt of the money turned over to Gruaz. $112 paid balance of rent.

Gleyse.

Fred. Gleyse, being sworn on the part of the defendant, testified: I lived in Highland 25 years; left there in the fall of '78. Was constable there about 4 years. I think I am acquainted with the reputation of Gruaz at Highland for honesty and fair dealing prior to 1877. I should say it is bad.

Question. Mr. Gruaz testified yesterday that he had, since those reports in reference to Dr. Bircher and his business, been
80 denounced in the streets of Highland, and never before. State whether that is true?

Witness. Well, I never heard since that suit. I left there a little before that suit; whatever I heard was before that. I heard Gruaz denounced on account of his dealings with parties—openly denounced in Highland on account of his dealings—prior to that suit very frequently.

Cross-Examination.

I was present when I heard it. I don't recollect hearing anybody call him thief myself when he was present. Am city marshal at East St. Louis.

Beck.

The deposition of Alexander Beck was read on the part of the defendant, as follows, viz:

Have known Gruaz over 20 years. Think I know his reputation in the community in which he lives for honesty. It is not good.

Cross-Examination.

81 I am an insurance agent. Gruaz and I are rivals in that business. I have had business dealings with him and found him always right in the dealings I had with him. Amongst the citizens of this community have heard the following persons say anything against Gruaz's honesty: Arnold Stoecklin, Alfred H. Junod, Andrew Wehrli, Henry J. Willimann, Leopold Knoebul, Sebastian Haffter, John Buchter, senior. I don't remember any other names just now. These things I heard in the last two or three years; don't recollect exactly. I never spoke one word to Bircher, nor he to me, in my life. I heard something sayed about the Gruaz and Bircher trouble, and read it in the paper, too. What I read in the paper was, that Gruaz had sued Bircher for $10,000 * * damages.

Re-direct Examination.

The fact that Gruaz and I are rivals in business would not induce me to testify otherwise in this case, not in the least.

Cross-examination continued.

82 I heard that Gruaz was not fair in his dealings. Bircher said the same thing, that he did not deal fairly with people.

Question. Is it not a fact that this talk about Gruaz's unfair dealings originated through the slanders circulated by Dr. Bircher in 1877?

Witness. No; there was nothing talked about it. In the talk with the men I have named they sometimes referred to particular transactions, and sometimes they talked concerning his character generally. Can't remember at this minute what particular transaction was referred to. As much as I know, I cannot swear positively that this talk about Gruaz' character, or any of it, did not originate through Dr. Bircher.

Emil Chipron.

The deposition of Emil Chipron, taken on the part of defendant, read to the jury, as follows:

My principal business is threshing. Have known Gruaz for about 25 years. I did not have much to do with Gruaz. I heard some say he was dishonest. From what I heard from others I thought his character was very bad.

83 *Cross-examination.*

I am the father of P. C. Chipron; had very little dealings with Gruaz; borrowed money from him four years ago. I also had some life insurance with him and Mr. Englehorn; thought I was pretty well swindled in that. The writing was done by Mr. Englehorn about five years ago. He was general agent for the Brooklyn Life; Gruaz was local agent. Both spoke to me about it. Englehorn told me if I would insure my life for $5,000 for 15 years, that if I would die after the 15 years, would be issued I would get my five thousand dollars in cash, and that the first payment would be $70, and every other year it would increase from $3 to $4. Having my policy done, I paid him $77, which was more than he required at first. I paid the next year to Gruaz $77. I was swindled for making the policy for $70, and had to pay $77; that's all I know. I am not in any kind of business now; I have a team and am teaming or hauling.

Question. In testifying to Mr. Gruaz' reputation do you mean that his reputation for honesty is bad among the bankers and business men of the community in general, or do you mean that there are a few individuals like yourself who imagine that they have been defrauded by him who are of your opinion?

84 Witness. Some say he is not honest, but I cannot say generally.

Question. Is it not a fact that you have heard this report of Gruaz the last two years?

Witness. I cannot say; they say the same thing ever since I have been in Highland.

Re-examination.

Mr. Gruaz knew about the bargain I made about the life insurance; he and Englehorn were together. He knew the amount of the insurance and the amount I paid, but was not present when the policy was delivered to me and the first payment was made.

Buehler.

Lorenzo Buehler's deposition was then read to the jury on the part of the defendant, as follows:

Have known Gruaz about 20 years. In regard to his character for honesty I did not have much to do with him, but what little I had was not very good. I heard some say he was a fraud. My business is saloon-keeper. I never heard any of the bankers say anything against Gruaz; I have forgotten it long ago if I ever heard any of the store-keepers or other business men say anything against Gruaz. I am acquainted with Martin J. Schott, but
85 never had any trouble with him.

The three last foregoing depositions on the part of the defendant, viz., depositions of Beck, Chipron, and Buehler, were taken at Highland, Ills., May 15th 1879.

The defendant introduced in evidence, which was read to the jury, the following translation of the letter of 1878, to Gruaz from Imoberstz, at Basle, Switzerland, in regard to the Swilkenborg agency at Highland, to which letter Gruaz referred in his evidence, viz:

Letter.

"In your last you wished to know who has recommended Blattner; so much as my wife knows she believes it was done through Fine & Company. I regret you and Walliser are not in harmony with each other. Walliser letter of '79. It seems to me they act in a very mean way towards you. It seems to me you find yourself attacked from all sides. One mistrust follows another, and it was probably the principal reason why they withdrew the control of Swilkenborg from you. Lady Landerer says now it
86 is easier to get along with you than was supposed. Whoever came from Madison County to Switzerland knew something bad about you. If I hadn't, through your punctual business management, the fullest confidence I would not have trusted you with another cent."

Which was all the evidence introduced on the part of the defendant. Whereupon the plaintiff, by way of rebuttal in regard to

the character and general reputation of himself, gave in evidence to the jury as follows:

Seybt.

C. H. Seybt, being duly sworn, testified:

I reside and have resided in Highland eighteen years. I own a mill. I own mines, real estate, and lot of business. Am a director of the Vandalia railroad.

Have known Gruaz 18 years. I know his character for honesty in the neighborhood in which he lives. I consider it good

Question. I mean before these rumors were started.

Witness. Yes, sir.

Cross-Examination.

Have heard his character for honesty discussed latterly. I never heard it brought in question prior to 1877 that I know of. Have heard his character discussed in so far as that he is
87 a leading politician and on the opposite side from myself, and during political excitement we frequently got to jawing at each other. Often politics will run so high that men will perhaps say some things which they wouldn't repeat in a cool moment; but although I am opposed to him in politics, I have always entrusted him with my business, and do yet. I will say here, though, that I have used more precaution when I heard that he was being sued, and knew there were notices in the paper somewhat reflecting on his honesty by Dr. Bircher. It was street talk when I heard Gruaz' character discussed since '77—that means this report of Dr. Bircher's. I heard nothing definite in regard to any other transactions than Bircher's discussed. I have heard that in case Bircher would prove his matter against him there would be other matters raked up; but what they were I never heard.

Re-direct Examination.

Those rumors of Gruaz's character grew out of the statements of Dr. Bircher, he having started a report that he was a thief
88 and dishonest. To illustrate: I went to Europe a year ago, and, having intrusted Mr. Gruaz with some business, I instructed my wife to be particularly careful how that suit would terminate, and in case it should terminate adversely she should withdraw the business.

Osthoff.

Deposition of Albert Osthoff:

That portion relating to the general reputation of Gruaz for honesty and good character was read in this connection on the part of plaintiff, as follows: "The general reputation of Gruaz for honesty and trustworthiness was good. Of course he had some enemies politically."

The plaintiff thereupon read in evidence to the jury the following depositions taken in his own behalf at Highland, Illinois, 27th May, 1879:

Vollotner.

Albert Vollotner's deposition:

I am 33 years old, and lived in Highland about 4 years. Have known P. C. Chipron since 1869. Am well acquainted in Highland. I am well acquainted with the reputation of P. C. Chipron in the community where he lives for truth and veracity. As far as I know it is bad. I would not, on that reputation, believe
89 him under oath. I am acquainted with Gruaz. Don't know what his reputation has been since I left Highland in 1873. I knew it while I was in Highland, and it was good.

Cross-Examination.

I have not heard his reputation discussed since I left Highland. I have not heard Gruaz spoken of at all since I left Highland in 1873. Before that time there was no discussion to make on that question. His reputation was not to be questioned. I did not hear his reputation discussed. Never heard his dealings with Rudolph Blattner spoken of. I don't remember hearing his dealings with any person spoken of. I am not friendly with P. C. Chipron; could not be friendly with a man of that kind. I think I heard his reputation for truth and veracity discussed here in Highland from 1869 to 1873 by Nicholas Rhor. It is difficult for me to give you names. Mr. Adolph F. Bandelier—that is about all I can give you. It was the opinion of both those parties that you could not depend on the testimony of P. C. Chipron. I do not know what I could say more. The way I came to be a
90 witness here to-day I was summoned, and was asked by Gruaz some time ago if I would come as a witness. I was not summoned, I was simply asked by Gruaz and paid my own way.

Knoebits

Leopold Knoebits' deposition read as follows:

I know Alexander Beck; I never did say to him that Tim. Gruaz did not deal fairly with the people or was dishonest.

Cross-Examination.

I don't remember that I ever had any conversation with Alex. Beck about Tim. Gruaz. I live in Highland between 25 & 26 years. I now keep a saloon. Was formerly a tailor. Been keeping a saloon about 8 or 9 years. They talk a good many things in a bar room. I did not pay any attention to all of it.

I heard Mr. Blattner talk of his dealings with Gruaz. I heard some people say he treated them fairly. Heard no one say to the contrary except Blattner. Did not hear of his dealings with Brunschwiller or Alfred Junod.

Stoecklin.

Arnold Stoecklin's deposition for plaintiff was read to the jury, as follows:

91 I live in Highland and know Alexander Beck. I never stated to him that Gruaz did not deal fairly with the people or was dishonest in his dealings.

Cross-examination.

I don't recollect what the conversation was I had with Beck about Gruaz. We had a conversation together about Gruaz. It was about his dealings with other people and what I heard. I don't recollect what I have heard. Have heard other people talking about his dealings and reputation. I cannot remember what they said. That was about two years ago; don't recollect that they talked about Blattner; I don't recollect how many people I heard talking about Gruaz; don't recollect whether I heard his reputation talked about more than once. Have lived in Highland about 25 years, and in saddler business. Have known John R. Blattner about 30 years.

Question. If you cannot remember whether you ever heard Tim. Gruaz' reputation for fair dealing discussed more *that* once, how can you remember that you did not speak the words which Mr. Beck says you said to him?

92 Witness. I don't remember; I don't know whether I am a witness here or not; somebody called me to come here. All that I heard in regard to what Beck swore was what Gruaz told me about ten days ago. He did not tell me what he wanted of me to-day here; came to me about some other business; about an administration of my brother's estate. His stepson asked me to come here. Think I have told all I know about Gruaz—that is all.

Re-direct Examination.

I understand the English language very well, but I cannot speak as well as you or Mr. Russell. I think it was in the fall of 1877, about that time that I heard the discussions in regard to Gruaz.

Re-cross Examination.

I never heard Bircher say anything personally himself; heard it from others; heard a good many; don't recollect who I heard; Charles Boeschenstein is the only name I can recall; I don't recollect whether I heard a good many talk or not; I heard some

93 about that time. We never had any conversation about Gruaz' fair dealing and honesty with the people. I don't recollect that I ever had any conversation with any person in regard to Gruaz for fair dealing and honesty with the people.

Rhor.

Nicholas Rhor's deposition read to the jury on the part of the plaintiff, as follows:

Have lived in Highland 30 years; am running a planing-mill, door and sash factory. Have known P. C. Chipron 30 years. I know that he injured himself by jumping off the train about ten years ago, about the time when he started the machine shops. He was confined to the bed and hurt in his head. From that I believe he is sometimes wrong in the head. I am acquainted with his reputation for truth and veracity in the community in which he lives; it is bad for ten years. Under no circumstances from that reputation would I believe him under oath.

Cross-examination.

94 I was always friendly with Chipron till I had a law-suit with him and he testified falsely. He was a witness against me; I think he did not tell the truth. That was last November. I did not see him jump off the train; he told me he did. I never studied diseases of the mind nor injuries of the brain. I never heard Gruaz' reputation for fair dealing and honesty discussed or spoken of in Highland from business men—only from people which are in general contrary and could not be believed. I have heard more good of him than bad. I heard bad of Gruaz only from people who could not be believed. I cannot remember for the last thirty years. I cannot give any names of persons that I heard discuss the reputation of P. C. Chipron for truth and veracity, but I heard it from all persons that had business with him. I cannot give any names; I will have no enemies. I could name John Charles and Eugene Plaquet, Fitz Kunz, Tholman, and Albert Volloton. I can name more, but I don't want to. I am a
95 business man; I don't wan't to burst my business. I will not name another man because of my business.

Suppiger.

Charles B. Suppiger's deposition for plaintiff was read, as follows:

Have lived in Highland for about 28 years. Have known Gruaz about 15 years. Am acquainted with his reputation for honesty and fair dealing. It is good as far as I know.

Cross-examination.

Have heard his reputation discussed. Could not exactly say—don't remember—when, where, nor by whom. I have heard it spoken with regard to his dealing with people in loaning money as agent, and in connection with various estates, also in connection with John R. Blattner. The rumor was about a note, but I could not say anything more. During the past ten years I have not heard frequently complaints from different sources of his dealings with people in real estate and about the handling of money. To my

knowledge he never had any trouble with my father; have
96 not heard my father speak of having any trouble with him. I heard rumors about the Bircher matter; otherwise I never heard anything. I have not heard about the Blattner matter. I am a harness maker. Never heard the reputation of Gruaz discussed.

Re-direct Examination.

Question. Did you understand the question when asked you the last time, and did you mean to answer that you have never heard Gruaz' reputation discussed?

Witness. I understood it the first time, but I misunderstood it the last time.

Schott.

Martin J. Schott's deposition taken and read to the jury on the part of the plaintiff, as follows:

Am 48 years old; lived in Highland 22 years. I am acquainted with the general reputation of Gruaz in the community where he lives for honesty and fair dealing. It is good. I know Lorenz Buehler, the witness who testified in this case against the rep-
97 utation of Gruaz. I heard sometimes that his character was good (Buehler's), but my driver told me that he stole beer. I let him come to my office and told him if he did not settle the matter and pay it I would send him the constable, and he paid it. There were four or five kegs of beer. I have heard the general reputation of Gruaz discussed by the people who know him and have dealt with him in business as to fair dealing and honesty. Have heard complaint only from one man—P. C. Chipron. Never heard any complaint from any body that had business with him. I did hear the rumors, but all from Chipron. I heard others speak of rumors of Gruaz; all what Chipron had said.

Streip.

Jacob Streip's deposition taken and read to the jury for the plaintiff, as follows:

Am 25 years old; have lived in Highland 9 years; known Gruaz 13 years. Am acquainted with his general reputation for honesty and fair dealing in the community where he lives.
98 It is good as far as I know. I know Lorenz Buehler, the witness who testified in this case against Gruaz. His character for honesty is that he is a mean dog, because he stole a half keg of beer from me while I was driver for Martin J. Schott.

Cross-examination.

I know what reputation is. If a man is honest and does what is right that is reputation. If a man acts badly and no one knows it,

it would be hard to say whether he would be good or bad. Buehler stole my beer from the wagon, and I being a poor boy had to pay for it. Heard several persons say he was a man of bad character, but can't remember who they were. I heard say that he stole for a girl $100 which she left for safe keeping. Mrs. Meyer said so. Never had any difficulty with Buehler except when he stole my beer. I did hear from Valentine Clements about that girl.

The plaintiff thereupon introduced the following witness in open court:

99 *Boyle.*

H. E. Boyle testified:

I reside in Edwardsville, Madison County, Illinois, and have lived in the county 13 or 14 years. Am clerk of the county court; was treasurer of that county from '75 to '77. Know Gruaz about 8 years. I know a great many people about Highland; nearly all that vote. Gruaz is generally known throughout the county, I think. Think I know *I know* his geoeral reputation for honesty in the county; it is good.

Cross-examination.

I have had business transactions with him—money transactions. Not very frequently. Had them while I was collector of taxes; sent him receipts and he collected the money and sent it to me. He was not a deputy collector. Had no deputy collector there. Had other transactions with him where money passed. I never lived in Highland. Private business sometimes called me over to Highland three or four times a year. I own no property there.

Have heard his reputation for honesty discussed out there.

100 Have heard it called in question prior to 1877.

Re-direct Examination.

I mean by that I have heard it talked about. One would ask another whether Gruaz was a fit man to do certain kinds of business for him. The result was not bad; was good. Never heard his honesty discussed for 1877.

Cooper.

John F. Cooper, being sworn, testified:

I reside at Alton, Madison County, Illinois, of which county I am and have been sheriff for six years. Should think I am pretty generally acquainted through the county. Am known in every town and precinct in it. I know the people of the county generally. I know Gruaz and have known him for 11 or 12 years personally. Am well acquainted at Highland with all classes pretty much. I never heard Gruaz' reputation questioned in my life till this affair came up. Can say that I am acquainted with his reputation at Highland for honesty; it is good.

101 *Cross-examination.*

I never heard his transactions discussed out there till this affair took place, Heard no special transaction, but after this transaction occurred. I was sheriff at the time, and there was a good deal of talk at the time at Edwardsville. Gruaz was sued by Bircher, and there was a good deal of feeling manifested, and I have heard several parties speaking derogatory to his business character about that time, but I don't know the nature of the transactions. That talk was generally that he was not the kind of business man he ought to be. The discussion arose from the Bircher affair.

Cole.

G. M. Cole, being sworn, testified:

I reside at Edwardsville. Have lived there 15 or 16 years. Am at present master in chancery of the county, which position I have held six years this fall. I know Gruaz; got acquainted with him in the fall of 1863. Think I know his reputation generally for honesty; it is good.

102 *Cross-examination.*

I don't know but what I have heard his reputation discussed. I never heard it called in question as to his dishonesty, but as I do other prominent men of our county, for Gruaz is a prominent man of our county; I never heard his business integrity discussed. Never lived in Highland. Have had a great many business transactions with Gruaz connected with my office and others; have sent him notes to collect. Don't remember whether I have had any other transactions or not; have sent him notes to collect.

Re-direct Examination.

About a sale, I was going to say. I had a sale in which Gruaz was interested; think party to the suit. In making computation I made a mistake of some 30 or 40 dollars against other parties interested in the suit; they would have to lose that; it was my mistake, and Gruaz had the money. I talked to no one but those inter-
103 ested, and they said Gruaz would pay the money over as soon as he found it out. He was not only willing, but anxious, as soon as he found it out, and refunded it.

Cross-Examination.

That's fresh in my mind; I will tell you. I know almost any prominent man's reputation with whom I am acquainted; couldn't tell you who I heard discuss it. I become acquainted with people, and as to telling every man I have heard discuss his reputation, I can't. I am acquainted with the reputation of men, and I am acquainted with Gruaz's reputation. In my opinion it is good.

Gerke.

H. C. Gerke, being duly sworn, testified:

I reside at Marine, Madison County, Illinois; have lived there 46 years; have been associate justice in the county for four years, or a little over; Highland is six miles from my place; I know almost every person in Highland. Have known Gruaz, it must be, nearly 25 years. I know his general reputation for honesty in the neighborhood in which he lives; it is good.

104 *Cross-Examination.*

Never heard it discussed till lately, and then only with respect to the Bircher matter. His reputation has been good with me; consider it good yet with those intimately acquainted with him.

Re-direct Examination.

I consider his reputation was hurt with others.

Thorp.

Mason Thorp, being sworn, testified: I live and have lived in Highland for 35 years. Am supervisor of Helvetia township. Have known Gruaz for 18 or 20 years, may be more. Know his general reputation in the community in which he lives for honesty. It is good.

Cross-Examination.

Since the suit in the county court commenced, there has been a great deal of talk with regard to this transaction, but not as to any other. I believe I did hear John R. Blattner talk about his own relations with him. He said he had some trouble with him.

That is all.

105 *Weinheimer*

Henry Weinheimer recalled, testified:

I have lived in Highland 25 years. Known Gruaz ever since I lived there. His general reputation is about as good as any body as a business man.

Cross-Examination.

I was quite astonished when Mr. Blattner was on the witness stand. He related some transactions he had with him four years ago. I suppose it would come up. Met Mr. Blattner in Switzerland and talked with him. I did hear some talk, off and on two or three or four years. Have heard it brought in question, and he has been spoken of as dishonest and unfair, with respect to parties having business with him. I have heard it discussed for several years. That was before this trouble with Bircher.

Re-direct Examination.

I heard that from three or four parties, and when I questioned them it turned out quite different.

Mudge.

E. W. Mudge, being sworn, testified:

I live six miles north of Highland. I was born there
106 thirty-five years ago. I hold no official position now. Have been supervisor of the township, also justice of the peace. I know Gruaz, and have for 12 years. Know his general reputation for honesty in the neighborhood where he lives; it is generally good. Yes, sir; it was before those rumors came out.

Cross-examination.

I only heard Gruaz' general reputation for honesty and fair dealing with persons with whom he had business discussed once. Not living in Highland, I didn't generally hear the discussions that were there, but the first time that I heard his reputation called in question was by a friend of Dr. Bircher, William E. Wilson, of the Southern Hotel, burned probably six or seven months before that, can't remember. Have heard it discussed by him, and subsequently have heard this suit spoken of.

Question. Have you heard his reputation as to honesty and fair dealing with whom he did business discussed?

107 Witness. Yes, sir; generally round the country; men who have done business there; can't tell you exactly; the last five or six years I have heard his business honesty discussed. Yes, sir; have heard his reputation brought in question.

Re-direct Examination.

Mr. Wilson was the only one. He got his information from Bircher. Said Bircher said he was a damned thief.

(On motion of defendant's att'y this last hearsay evidence was excluded from the jury.)

Mummy.

Fred Mummy sworn, testified:

I live in Edwardsville. Have lived there since 1863. Formerly I lived in six miles of Highland. I don't know P. C. Chipron personally; I know him when I see him. I don't know P. C. Chipron's reputation in the neighborhood where he lives for truth and veracity. I do around in the country. I know his general reputation where he is known. It is bad. I know Mr. Gruaz
108 personally for 14 years. Know his general reputation in the neighborhood for honesty; it is good.

Cross-Examination.

My business is keeping a billiard and drinking saloon in Edwardsville. I never lived in Highland. Edwardsville is 18 miles from Highland. Never heard Chipron's reputation discussed in Highland or the neighborhood where he lives. All I know is what I heard others say from there. Heard several. Mr. Cowfren is one. Had a law suit I suppose. Heard it questioned before that suit in Edwardsville, but not in Highland—did not grow out of a law suit. Have heard the reputation of Timothy Gruaz for honesty and fair dealing with those with whom he had relations, discussed in Edwardsville, but never in Highland. Don't know who I heard discuss it—a good many—couldn't remember particularly.

Todd.

Henry E. Todd, being sworn, testified:

I live at Highland and have over 40 years. Am stock dealer and constable. Have known Gruaz for 20 years. I know
109 his general reputation for honesty and fair dealing in Highland. It is good.

Cross-Examination.

I never heard his reputation for honesty and fair dealing questioned till late years. Have heard it the last year or two—rumors on the street—"Wonder how Tim is." Heard he had been sued—so and so. These rumors are in the street, and by those men testifying here to-day against him. They are the only ones I ever heard say anything. P. C. Chipron and Blattner are the principal men. Never heard his transactions with a widow lady there in Highland discussed. I never did.

Kinnie.

Louis E. Kinnie, being sworn, testified:

I live in Highland where I have resided for 37 years—born there. I know Gruaz, have known him for 20 years. I am a merchant. I know his general reputation for honesty and integrity where he lives. It is good.

110 *Cross-Examination.*

Have heard his reputation for honesty and fair dealing with people with whom he had business discussed as a general thing, not in any particular case. Can't tell exactly for how long—4 or 5 years. I have heard rumors. Well, can't say those were concerning his dealings with other people; business transactions, no; just street talk. They were rumors, nothing particular, relating to his business transactions.

Re-Examination.

Chipron and Bircher were the only ones I have heard of.

Cross-Examination.

I have heard in general.

Garishee.

W. A. Garishee, sworn, testified:

I reside in Collinsville, Madison County, Illinois. Have lived there five and a half years or a little over. I consider I am generally acquainted over the county, and pretty generally acquainted around Highland also; in fact, much better acquainted there
111 than in many other places. Have known Gruaz for the past five years. I know his general reputation for honesty as far as I have gathered; it is excellent.

Cross-Examination.

Never heard it called in question before I heard of this difficulty between him and Bircher. I had heard something said about it before that; talked of in this way; in the course of conveasation, discussing our friends, he was always spoken of as one of the squarest men in the county of Madison among my friends. I don't know that his reputation with regard to business matters was specially discussed. I have had business transactions with him; attended to some business for him in St. Louis. Have heard Gruaz' reputation discussed since the difficulty between Gruaz and Bircher. I never heard of any other transaction with him discussed.

Glass.

E. B. Glass, being sworn, testified:

I reside in Edwardsville. Have lived in the county since
112 '64. Have been state's attorney for the county from 1872 to 1876. I know P. C. Chipron and have for some time. I believe I do know his general reputation for truth and veracity in the community in which he lives; it is bad. I know Gruaz; have known him since 1870 or '71, I have forgotten which; some eight or nine years. Am very well acquainted in Highland. I know the general reputation of Gruaz for honesty and truth; it is good.

Cross-Examination.

Never heard Gruaz' reputation till lately, since he became involved in a law suit with Bircher in the county court. Since that time I have heard it questioned—can't mention in particular any transaction. Generally those discussions did not involve any other business transactions to my recollection. I never heard his character questioned till in the last year or two—about the time of the

trial in the county court. Have heard parties speak of his reputation since that time, not prior to that time. I don't know when the judgment in favor of Gruaz was rendered.

113 Question. That was February '78, since that time you say his reputation has been discussed and uniformly his reputation has been good?

Witness. I never heard his character questioned previous to that time.

Question. That ain't the answer--you say you are acquainted with his general reputation for honesty and fair dealings, and you stated further you never heard it discussed till after this matter between him and Bircher originated. You state his reputation is good. Now I ask you if that reputation is good since this difficulty between Dr. Bircher and himself?

Witness. Well, I have heard parties speak who did not speak to me in the same manner with regard to Gruaz as they did formerly.

Question. How did they speak before that time, you never heard it discussed?

Witness. No further than I have understood.

114 Question. Never mind what you understood. You say you have heard them talk differently. Does that mean you had other talk than before that time?

Witness. Well, I have talked to some men—I know men—I understood from them previous to this time that Gruaz was a good and reliable man, and since that time they speak as though he had got into disrepute—something of that kind—to be on my guard or something of that kind. Can't mention any particular names. One man I could mention since that time is B. E. Hoffman—can't tell where he is. He used to be county clerk of Madison County, I think two terms. I believe he came from Highland to Edwardsville. Don't remember how many years he lived there. I know a few years ago Mr. Hoffman spoke of Mr. Gruaz in high terms to me, but lately he spoke differently from rumors circulated about Gruaz in Highland.

Re-direct Examination.

115 I understood what Hoffman said grew out of this transaction—troubles between Bircher and him?

Pickett.

John A. Pickett, being duly sworn, testified:

I reside in Edwardsville. Have lived there something over 50 years, with a little interval. At present am in the banking. Have known Gruaz for a period of perhaps 25 years. I know something of the business standing and reputation of most men in Madison County. My knowledge of the reputation of Gruaz would have influenced me to repose those business trusts and confidence

in him that I would extend to any other honest man. I would say his reputation is good.

Cross-Examination.

I am in precisely the same predicament of friend Glass. You will perhaps get it out of me anyhow. I will say that Hoffman is my near neighbor, with whom I have had as much talk about Gruaz as any other man; and, I must say, that much of my favorable opinion or impressions of Gruaz I have received from Hoffman; but latterly, and I may say, once since this trouble
116 between Gruaz and Bircher, Hoffman has sometimes expressed himself differently. And let me say now, once for all, that he is the only person with whom I have talked about that matter or about Gruaz' general reputation, before or since. I have never heard Gruaz' general reputation in Highland discussed nor questioned. He, Hoffman, hasn't talked since this trouble as he talked before about Gruaz. These conversations with Hoffman, latterly had, were since the trial of the business difference between Bircher and Gruaz in the county court. Yes, sir; if it can be construed into something unfavorable to the character of Gruaz, it was since that time. Hoffman admitted, and I understood at that time, that the trial had resulted in a judgment in favor of Gruaz. It didn't create an unfavorable impression on my mind, since the impression I received with regard to Gruaz's character was rather too lasting and too permanent to be affected by one transaction, and I was rather disposed to account for Mr. Hoffman's change by the troubles and misunderstandigs growing out of politics. They
117 are both somewhat bitter partisans. Perhaps it was not this trouble, but political differences; both belong to the same party.

Judd.

Albert H. Judd, sworn, testified:

I reside in Marine, Madison county, Illinois, about 6 miles from Highland; am pretty well acquainted at Highland; have lived there 37 years. I know Gruaz, and have for about 12 years. I think I know his general reputation for honesty; it is good.

Cross-examination.

I never heard it discussed or brought in question.

Dale.

M. G. Dale, being duly sworn, testified:

I don't recollect when the trial spoken of in the county court was, over a year ago, probably the February term; haven't had my attention called to it. When the case was called the attorneys said they didn't wish a jury trial; wished me to hear the case and de-

termine it. When it was called Mr. Bircher, with his attorney, Mr.
Hadley, had a paper before them of accounts; the items
118 were read off. I couldn't tell what they were now. It wasn't
necessary for me to look at them. The items were read off.
Mr. Gruaz sat there with some large books, and I think he assented to every item charged in the bill of Bircher. Well, they had it footed up, and their two accounts agreed as to amount that had come into Gruaz's hands. Then, as to credits, I think Bircher—I couldn't give all the details, because I never expected to be called on again—Mr. Bircher had some credits on that account, and he was asked if those were all the credits, and I think he said they were. Gruaz then produced some drafts and checks or receipts and handed them to Mr. Bircher, and his attorney took them and examined them. Mr. Bircher said that's my signature; he didn't deny his signature, and when he admitted those they were set down by the attorneys, and I think the only item there was any difference about was one draft; what the amount was I don't know,
because it wasn't material to me to know the amounts were
119 further than the credit. One was objected to, but after hearing the evidence I considered that the money had come to Mr. Bircher's hands, and allowed that as a credit. Then I asked him to see how the account stood betwen the two parties, and the one balanced the other. If anything there was a little balance in favor of Gruaz. That was all I had to do with the case. They pretty much fixed it up amongst themselves—was to decide with reference to that check whether it was a proper credit or not. Bircher had some credits marked on the account, and he was asked if those were all the credits, and I think he said they were. Then Gruaz drew out some checks and presented them, and Bircher said I don't deny my own signature. I had very little to do with the matter, except to decide as to that one check or item. After it was over there was no asking for a bill of exceptions, and I supposed the parties were all satisfied with it.

Boeschenstein.

Charles Boeschenstein, recalled by the plaintiff, testified:
120 I was present at the trial in the county court between Gruaz and Bircher. This is a statement of notes out at that time. After I was appointed agent for Bircher part of that money was collected. Part was uncollected when I was appointed agent. That came to him subsequently. I believe this is a copy of a statement as to what parties were renting the land and the amount of rent they were to pay, not a statement of moneys. In regard to Bircher's testimony on that trial, he claimed Gruaz owed him about $1,000. He denied certain credits till the drafts were produced. One draft he denied. He denied it all at first. It wasn't believed that he received any money from Gruaz; if it was, the drafts would be signed with his signature. His testimony in regard to

having given Gruaz credit for money sent him, was that he hadn't received any money any more than he had credited. That is the draft he denied. He said on the trial that he hadn't received the money for that.

Cross-Examination.

121 I believe there was shown Bircher this draft here for 161 dollars and some cents, with Bircher's name on it. He couldn't dispute when his name was on it. You see, when he made a settlement he admitted he received it in full. After having made a full settlement, and instead of being indebted—instead of Gruaz being indebted—Bircher admitted he would be indebted to Gruaz. He admitted all the checks and drafts with his name on them. Bircher did not on that trial claim that a statement had been rendered him by his agent, the plaintiff, in June, '76, and that all those checks and drafts which bore date prior to that time had nothing to do with the case.

At that trial he produced this account, and they were reading off every item; this corresponded.

Bircher produced his account against Gruaz. If you show me the statement I can tell you, otherwise I can't, whether the account only extends from the date of the statement given him by Gruaz.

122 I believe I did see this statement at that time. The date of that is June, '76. That corresponds with this statement given him by Gruaz. Yes, sir; it seems so to me that Bircher has given Gruaz credit for all drafts which bear date subsequent to this date. If you compare the drafts with the figures you can see whether it is so or not. Well, Bircher admitted at that time that he received all that money; at first he denied it—denied positively ever receiving any money. Then, when he saw those drafts with his signature on the back, he admitted it. He did not claim that they were not payments made previously, but that he got credit for the full amount—full account paid him by Gruaz. That's what I thought, according to the settlement they made there. This statement I looked at a while ago does not purport to go back further than 1875. It includes 1875 & 1876. There were no drafts that I know of produced on that trial that bore date in 1874. I do not swear there were none. You must produce them to me. How can I swear to a draft if I

123 don't see it. Those might be different drafts there. I don't know. I believe that is one of the drafts that was used on that trial; if you will show me the statement—the date of that is March 9th, '74; the date of this one is November 23d, '74. This one is January 13th, 1875. This one is Dec. 20th, 1875. Yes, sir; it seems so, that all those checks bear date prior to the date of this statement that Gruaz gave Bircher.

At that time Bircher admitted them all, said they were correct, that he was satisfied. He received that amount and had full pay-

ment of his rents except what was collected by me, rents of '76. The notes delivered over to me was one for $185, one for $86, and some other rent notes for the year 1877, from George Garson and others. That was another year. The years '75 and '76 were the only years settled between them.

The notes turned over to me were those Keefner notes, Smoker notes and Keefner-Sobridge note $80, rent due for '77, you understand. Here is the rents I received here. They were the notes I received at the time from Gruaz. None of those notes were
124 turned over to me. The Smoker notes and this one Sobridge note of these. This Smoker note originally for $440; there was a balance of a $145 due on them; whole note was here; $80 note. The balance on this and the $80 on this was turned over to me and the balance had been collected—very likely. This is a statement of what I received here. In addition Gruaz had received on the rent of '77 $100 from Mathias Kircher. The balance I credited afterward. There was $200. The other $100.

Re-direct Examination.

Yes, sir, I understood that at the conclusion of the trial Bircher expressed himself satisfied that he had paid in full. He admitted that he was wrong at the time in his account. The date of this draft is April 30th, '77. The amount is $318.25. He denied receiving that money before the check was presented to him, denied receiving any money till he seen these drafts and the signatures on the back. There is no credit for that draft in his statement, or for any amount of money.

125 *Gruaz.*

Timothy Gruaz, recalled, testified as follows:

I was present at the trial in the county court. I tell you that Bircher got at my office a statement of the manner in which the land was rented for the two years '75 & '76. Well, at the trial he claimed that the statement was what I pretended to owe him on the first of June, '76, which never was true, because I never owed him anything. The moment I collected I remitted. And those were notes in my hands at the time and they were collected after due. The first half of the statement is for ten hundred and ninety dollars for the year '75, which amount was due. All those notes were due on the 1st December, '75. Then the doctor goes on and gives me credit only; begins his credit on the 1st Dec. '76 and ignors all payments during the year 1875. That is the way it is mixed up. That's an account for the whole year '75, and he gives me no credit for that year, and he swore point blank
126 that he kept his books himself. That they were well kept, and that he gave me credit for every amount I remitted to him. When the drafts were presented he had to acknowledge

that he had given me no credit. This draft for $318 $\frac{25}{100}$, April, '77, he denied. Said he had never received it. Afterward admitted it. In regard to the draft for 161 dollars and some cents, said that he never received it under no circumstances. I will explain to the jury how this happened: The money was received after banking hours; before the mail train left, and in my anxiety to remit the money, I went to the bank and asked the banker to give me a draft; that the doctor was very anxious to get his money in time. He told me just to issue this check on us. They will recognize it in St. Louis. I, of course, immediately went and issued their check and had it in time for that afternoon. That is the check: Pay to Dr. R. Bircher, or order, one hundred and sixty-one dollars and eighty cents. Endorsed: Rudolph
127 Bircher. Then the next endorsement: Pay—remit to North Missouri Savings Institution, H. H. Wernse, cashier, or order.

The draft is: Pay to the order of H. H. Wernse $161; the same amount. The bank was closed. That happened several times. That Chipron receipt has nothing whatever to do with Bircher's case. A renter, J. H. Ysbett, was owing rent, but the rent was not quite due in August. Rent was due the 1st Dec. A private account—this is the account referred to. Saved my claim first; assigned the doctor's claim, saved first. That was my claim; his was not due yet. They pretended to make this plea, that this was not part of the rent, which it wasn't. Here's a receipt of the squire, Boeschenstein, showing that he received some of those notes. Here's the receipt. When I was sued by Bircher I didn't know upon what he based his suit. I knew perfectly well I didn't owe him a cent, and, therefore, I went to the bank in St. Louis and got the drafts, because he was very careful not to send me a
128 receipt. Never sent me a receipt in his life, but I took the precaution to remit him drafts. I got all the drafts because I did not know where he might base his charge. They amount to $200 more than he showed me in his claim.

I never refused to render a statement. He never asked me for one I did not give. It was always clear. I always remitted, and notes remained in my hands till paid.

The foregoing was all the evidence introduced on the trial of said cause by either party thereto.

Instructions of Court.

Whereupon the court instructed the jury as follows:

1st. The court said: "Gentlemen, there is one branch of this case about which there may be a misapprehension. I want to correct as far as I am concerned. On the trial I admitted evidence as to the wealth of the defendant. I did it on this ground sim-
129 ply, that a wealthy and influential man, who uses slanderous words towards another, would be likely to produce a greater

effect than the words of an ordinary man. That is the only view under which I admitted it, and I think it should go no further. I am, therefore, disposed to say to the jury, if they should come to the conclusion that the plaintiff is entitled to recover, they will not take into consideration the evidence in relation to defendant's pecuniary circumstances in estimating the amount of damages, but what the plaintiff is to recover, if at all, is the amount of injury he has sustained by the slander of the defendant, and that he is entitled to recover whether the defendant is rich or poor, no more because he is rich than otherwise.

To the giving of which instruction the defendant at the time excepted, on the grounds that it was calculated to make upon the mind of the jury the impression that they could presume damages
130 to the plaintiff from the words uttered on account of defendant's wealth, without regard to the proof of actual damages.

2nd. In reference to the testimony of State's Attorney C. L. Cook, the court instructed the jury as follows:

"I admitted that evidence with an explanation, and with the explanation made in the admission of it I think I am content, and I think the jury may take it into consideration; but if they think the defendant was actuated by honest motives in making the declaration he did they will disregard it."

To the giving of which last instruction the defendant excepted, for the reason that the instruction ignores the element of want of probable cause, and for the reason also that the jury should have been instructed to disregard Cook's testimony entirely.

3d. "If the jury should come to the conclusion that the plaintiff is entitled to recover they should give reasonable damages
131 for loss of business and injury resulting from the speaking of the words, but beyond that they should not go."

Whereupon the jury found the issue for the plaintiff, and assessed his damages at the sum of six thousand dollars.

And thereupon the defendant, by his attorneys, viz., on the 6th day of June, A. D. 1879, moved the court to set aside said verdict and to grant a new trial in said cause, and assigned the following reasons therefor:

Motion for New Trial.

1st. That the court gave improper instructions to the jury on behalf of the plaintiff.

2nd. That the court refused proper instructions asked by the defendant.

3d. That the court admitted improper evidence on behalf of the plaintiff.

4th. That the court refused proper evidence offered by the defendant.

5th. That the verdict of the jury was contrary to the instructions of the court.

6th. That the jurors misbehaved in considering their verdict.

132 7th. That the finding of the jury was contrary to law in said case.

8th. That the finding of the jury was contrary to the evidence in said cause.

9th. That the finding of the jury was contrary to the law and the evidence in said cause.

10th. And for divers other causes, wherefore the defendant prays this honorable court to ward and grant to him a new trial in said cause.

Suggestion of Death.

And afterwards, to wit, at the June term, A. D. 1879, of said United States court, to wit, on the 24th day of June, 1879, there was filed in the office of the clerk of said United States court the following suggestion of the death of said defendant, Rudolph Bircher, viz: "And now comes Joseph Gillespie, and, as amicus curiæ in the above entitled cause, respectfully suggests to the court the death of the defendant, Rudolph Bircher, who departed this life on the fourteenth day of June, A. D. 1879, at his place of residence in the city of St. Louis and the State of Missouri; and herewith the said Joseph Gillespie files an affidavit in support of this suggestion.

J. GILLESPIE.

133 *Affidavid in support of suggestion.*

In the Circuit Court of the United States in and for the Southern District of Illinois, June Term, A. D. 1879.

TIMOTHY GRUAZ
v.
RUDOLH BIRCHER. } Slander.

W. H. H. Russell, being duly sworn upon his oath says that the above-named defendant, Rudolph Bircher, departed this life on Saturday, the fourteenth (14th) day of June, A. D. 1879, at the city of St. Louis, in the State of Missouri, and was buried on the 16th day of June, A. D. 1879.

W. H. H. RUSSELL.

Sworn to and subscribed before me this 23d day of June, 1879. Witness my hand and the seal of the circuit court, city of St. Louis.

[L. S.] CHAS. F. VOGEL, *Clerk.*

And thereupon moved the court to abate the said suit.

And after the death of said defendant as aforesaid, the said plaintiff, by his counsel, filed a motion for judgment *nunc pro tunc.*

134 *Motion for Judgment nunc pro tunc.*

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, } *ss.*

June term, A. D. 1880.

TIMOTHY GRUAZ *v.* RUDOLPH BIRCHER. } Case.

And now comes the said plaintiff, by his attorneys, and moves the court for a judgment in his favor against said defendant, upon the verdict of the jury rendered herein, and as of record in this court, said judgment to be entered as of the 7th day of June, A. D. 1879, nunc pro tunc.

G. B. BURNETT &
ROBINSON, KNAPP & SHUTT,
Attys. for Plff.

And afterwards, to wit, on Monday, August 16th, 1880, at the June term, A. D. 1880, of said circuit court of the United States, said motion for a new trial made on behalf of said defendant, likewise the said motion for judgment *nunc pro tunc*, came on to be heard by the court, when and where and whereupon the court made and rendered the following special judgment or order in said cause:

135 TIMOTHY GRUAZ *vs.* RUDOLPH BIRCHER. } Trespass on the Case.

Judgment.

Now, on this day came again the parties hereto, by their attorneys, and there came up for decision by the court the motion of the said defendant for a new trial herein, and also the motion made by his attorneys for an order abating this suit & filed July 12, 1879, and said motions having been heard by the court & the court being now sufficiently advised in the premises, doth order and adjudge that said motions be and the same are each overruled; whereupon the said plaintiff, by his attorneys, moves the court for a judgment herein on the verdict of the jury as entered of record, and to be entered as of the seventh day of June, A. D. 1879, nunc pro tunc.

And it appearing to the court that the verdict of the jury herein was brought into open court on the sixth day of June, A. D. 1879, and duly entered of record on said day; and whereupon the defendant, by his attorneys, moved the court for a new trial of said cause; and on the seventh day of June last afore-
136 said filed their said motion in writing, and the hearing by the court of said motion was postponed to a then future and

convenient day of the said June term, A. D. 1879, of the court, and that pending the hearing of said motion so postponed as aforesaid, the defendant, and on the 14th day of June last aforesaid, departed this life.

It is therefore ordered and adjudged by the court that the motion by the plaintiff for judgment as aforesaid upon the said verdict of the jury be granted, and that the plaintiff do have and recover of the defendant the sum of six thousand dollars, according to the force and effect of the recovery aforesaid, his damages as aforesaid assessed and found by the verdict of the jury herein, together with his costs in this behalf expended, and that he have execution therefor.

And it is further ordered and adjudged by the court that this judgment be entered of record as of the seventh day of June,
A. D. 1879, and shall become a lien and be in force and
137 effect from and after said day as against said defendant, his heirs or devisees only, and being the day of the filing by the defendant of his said motion for a new trial herein, and leave is given to the personal representatives of said defendant to present a bill of exceptions herein within sixty days from this date, and to pary for a writ of error to the Supreme Court as they may be advised, and no execution to issue herein until after said sixty days.

To which decision of the court in overruling said motion for a new trial, and in granting the said motion of said plaintiff for judgment *nunc pro tunc*, and in rendering said special judgment *nunc pro tunc* in favor of said plaintiff, the counsel for the late defendant, Rudolph Bircher, deceased, as *amicus curiæ*, then and there excepted.

And afterwards, to wit, on the 24th day of August, 1880, at the June term of said court, John C. Vogel, executor, &c., prayed and obtained a writ of error to United States Supreme Court.

138 TIMOTHY GRUAZ *vs.* RUDOLPH BIRCHER. } Trespass on the Case.

And now, on this 24th day of August, 1880, come again the parties, by their counsel, and it appearing to the court that John C. Vogel was by the last will and testament of Rudolph Bircher appointed executor of his estate, to whom letters testamentary have issued, and who has entered on the discharge of his duties as such executor; it is therefore ordered by the court, on the motion of said Vogel, that he be allowed a writ of error in this case to the Supreme Court of the United States, to operate as a supersedeas, on his entering into bond to the plaintiff in the penalty of $12,000, conditioned as the law directs, with security to be approved by the court.

To preserve all which matters of record the said defendant, John C. Vogel, executor of the last will and testament of Rudolph Bircher,

deceased, having entered into bond, &c., asks that this his bill
139 of exceptions be signed and sealed by the court, which is done.

Aug. 24th, 1880. S. H. TREAT. [L. S.]

(Endorsed:) Filed August 24th, 1880. J. A. Jones, clerk.

140 UNITED STATES OF AMERICA, } ss.
SOUTHERN DISTRICT OF ILLINOIS, }

I, John A. Jones, clerk of the Circuit Court of the United States within and for the Southern District of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause wherein Timothy Gruaz is plaintiff and Rudolph Bircher is defendant *is defendant*, as fully as same appears of file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this 30th day of September, in the year of our Lord one thousand eight hundred and eighty, and of our independence the one hundred and fifth year.

[SEAL.] J. A. JONES, *Clerk.*

141 In the Supreme Court of the United States, October Term, A. D. 1880.

JOHN C. VOGEL, EXECUTOR OF THE LAST will, &c., of Rudolph Bircher, dec'sd, Plaintiff in Error,
vs.
TIMOTHY GRUAZ, DEFENDANT IN ERROR.

In error to the Circuit Court of the U. S. for the Southern District of Illinois.

And now comes the said plaintiff in error, by James K. Edsall and John B. Hawley, his attorneys, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the court below erred in the reception and admission of evidence on the part of the plaintiff below.

2. The said court erred in permitting the plaintiff to prove by the witness, C. L. Cook, statements and complaints made by the defendant to him as state's attorney of Madision County,
142 Illinois, to procure an indictment against plaintiff below.

4. The court erred in not sustaining the motion of defendant to exclude proof of alleged slanderous words not alleged in the first and second counts of the declaration upon which the suit was tried.

5. The court erred in excluding evidence offered by the defendant below.

6. The court erred in its instructions and charge to the jury, that is in the portions and paragraphs of said numbered 1st, 2d and 3d, set out in the bill of exceptions.

7. The court below erred in overruling the motion that the suit abate by reason of the death of defendant below.

8. The court below erred in proceeding with the hearing and decision of the motion for new trial after the death of defendant below.

9. The court erred in rendering judgment against the defendant below after his death as shown by the record.

143 And for the errors aforesaid and other errors in the record appearing, the plaintiff in error prays that said judgment may be reversed, &c.

JAS. K. EDSALL,
JOHN B. HAWLEY,
Counsel for Plaintiff in Error.

(Endorsed on cover:) S. Illinois C. C. U. S. No. 209. John C. Vogel, Executor of Rudolph Bircher, deceased, plaintiff in error, vs. Timothy Gruaz. Filed 30th November, 1880.

110-311

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

JOHN C. VOGEL, EXECUTOR, ETC., OF RUDOLPH BIRCHER, DECEASED. *Plaintiff in Error,*

vs.

TIMOTHY GRUAZ, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

JAMES K. EDSALL,
JOHN B. HAWLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR.

Beach, Barnard & Co., Legal Printers, 104 Randolph St., Chicago.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

JOHN C. VOGEL, EXECUTOR, ETC., OF RUDOLPH BIRCHER, DECEASED,
Plaintiff in Error,

vs.

TIMOTHY GRUAZ, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF CASE.

The defendant in error brought an action on the case for slander against Rudolph Bircher in the Circuit court of Madison county, Illinois, at the March term thereof, 1878. The suit was subsequently removed, on the petition of the defendant, to the Circuit court of the United States for the Southern district of Illinois.

The counts of the declaration (first and second) upon which the cause was tried, are as follows:

Timothy Gruaz, the plaintiff in this suit, by G. B. Burnett and F. W. Burnett, his attorneys, complains of Rudolph Bircher, the defendant in this suit, of a plea of

trespass on the case; for that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, to wit, on the 15th day of October, A. D. 1877, at the county aforesaid, in a certain discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of those persons, spoke and published of and concerning the plaintiff the false, scandalous and defamatory words following, that is to say: "He (meaning the "plaintiff) is a thief." "He (meaning the plaintiff) has "stolen from me." "He (meaning the plaintiff) has stolen "my money." "He (meaning the plaintiff) stole from "me." "He (meaning the plaintiff) stole my money." "He (meaning the plaintiff) has embezzled my money." "He (meaning the plaintiff) is an embezzler." "He "(meaning the plaintiff) embezzled from me," meaning thereby to charge the *defendant* with the crime of larceny.

2d. And, also, for that whereas, afterwards, to wit, on the 15th day of October, A. D. 1877, aforesaid, in the county aforesaid, in a certain other discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the German language, spoke and published of and concerning

the plaintiff, the false, scandalous, malicious and defamatory words following, in the said German language, that is to say: "Er hat mir mein Geld gestohlen." "Er hat "von mir gestohlen." "Er ist ein dieb," which said words signified and meant in the English language, as follows, that is to say: "He (meaning the plaintiff) has "stolen my money." "He (meaning the plaintiff) has "stolen from me." "He (meaning the plaintiff) is a thief," meaning thereby to charge the plaintiff with the crime of larceny. (Printed Rec., 4.)

The record recites (*ib.*, 13) that on the fourth day of June, 1879, "the plaintiff withdraws his third count in his "declaration, and issue being joined on the remaining "counts," the trial was proceeded with at the June term, 1879, of the said Circuit court of the United States.

The trial resulted in a verdict for the plaintiff, with damages assessed at $6,000, returned by the jury June 6, 1879, whereupon the defendant entered and filed his motion for a new trial, and assigned therefor the grounds hereinafter stated. (Printed Rec., 14, 63.)

The record shows that on the 24th day of June, 1879, the death of the defendant, Rudolph Bircher was suggested by the Hon. Joseph Gillespie as *amicus curiæ*, said Bircher having died on the 14th of June, 1879. (*Ib.*, 15, 64.)

On the 12th of July, 1879, Mr. Russell as *amicus curiæ* (but formerly counsel for defendant), entered a motion that by reason of such death the suit abate (*ib.*, 16, 64), and on the 16th day of August following the plaintiff entered a motion for judgment on the verdict *nunc pro tunc* as of June 7, 1879. (*Ib.*, 17, 65.)

The record recites as follows:

"And afterwards, to wit, on Monday, August 16, 1879, "at the June term, A. D. 1879, of said Circuit court of "the United States, said motion for a new trial made on "behalf of said defendant, likewise the said motion for "judgment *nunc pro tunc*, came on to be heard by the "court, when and where and whereupon the court made "and rendered the following special judgment or order in "said cause: * * * *

"Now, on this day came again the parties hereto, by "their attorneys, and there came up for decision by the "court the motion of the said defendant for a new trial "herein, and also the motion made by his attorneys for "an order abating this suit, and filed July 12, 1879, and "said motions having been heard by the court, and the "court being now sufficiently advised in the premises, "doth order and adjudge that said motions be and the same "are each overruled; whereupon the said plaintiff by his "attorneys moves the court for a judgment herein on the "verdict of the jury as entered of record, and to be en- "tered as of the 7th day of June, A. D. 1879, *nunc pro* "*tunc*.

"And it appearing to the court that the verdict of the "jury herein was brought into open court on the 6th day "of June, A. D. 1879, and duly entered of record on said "day; and whereupon the defendant, by his attorneys, "moved the court for a new trial of said cause; and on "the 7th day of June last aforesaid filed their said motion "in writing, and the hearing by the court of said motion "was postponed to a then future and convenient day of "the June term, A. D. 1879, of the court, and that pend- "ing the hearing of said motion so postponed as afore-

"said, the defendant, and on the 14th day of June last "aforesaid, departed this life.

"It is therefore ordered and adjudged by the court that "the motion by the plaintiff for judgment as aforesaid "upon the said verdict of the jury be granted, and that "the plaintiff do have and recover of the defendant the "sum of six thousand dollars, according to the force and "effect of the recovery aforesaid, his damages as afore-"said assessed and found by the verdict of the jury "herein, together with his costs in this behalf expended, "and that he have execution therefor.

"And it is further ordered and adjudged by the court "that this judgment be entered of record as of the 7th "day of June, A. D. 1879, and shall become a lien and "be in force and effect from and after said day as "against said defendant, his heirs or devisees only, and "being the day of the filing by the defendant of his said "motion for a new trial herein, and leave is given to the "personal representatives of said defendant to present a "bill of exceptions herein within sixty days from this date, "and to pray for a writ of error to the Supreme court, as "they may be advised, and no execution to issue herein "until after said sixty days."

"To which decision of the court in overruling said mo-"tion for a new trial, and in granting the said motion of "said plaintiff for judgment *nunc pro tunc*, and in render-"ing said special judgment *nunc pro tunc* in favor of said "plaintiff, the counsel for the late defendant, Rudolph "Bircher, deceased, as *amicus curiæ*, then and there ex-"cepted."

"And afterwards, to wit, on the 24th day of August, "1879, at the June term of said court, John C. Vogel,

"executor, etc., prayed and obtained a writ of error to the "United States Supreme court."

Printed Record, 17, 65.

The BILL OF EXCEPTIONS was filed August 24, 1879, setting out the evidence and proceedings on the trial.

C. L. Cook, the state's attorney for Madison county, Illinois, was called as a witness on the part of the plaintiff, and it appeared that the defendant had consulted the witness and made complaint to him as such state's attorney in his official capacity, in reference to a charge against the plaintiff, which the defendant desired to present to the grand jury of Madison county then in session, to be prosecuted by the witness. The defendant's counsel objected to the witness testifying to matters disclosed to him by the defendant, under the circumstances stated, on the ground that such communications are privileged.

The COURT: "I will ask the witness if he regarded it professionally as a privileged communication?"

WITNESS: "I had never met defendant before; he was "introduced to me by a citizen of our place, and he in- "formed me that he wanted to talk with me with regard "to a matter he wanted to bring before the grand jury."

The COURT: "I will allow the witness to state what "the doctor said on that occasion. Of course, if he gave "the communication to the witness in good faith, there "would be no malice about it, and I shall instruct the "jury to disregard it." The objection is overruled, "to "which ruling of the court the defendant at the time ex- "cepted."

WITNESS: "As I stated, I had at that time no ac- "quaintance with defendant whatever. He inquired for "the state's attorney, and was introduced to me, and he

"spoke of his affairs. He said he wanted to bring a mat-
"ter before the grand jury in regard to Mr. Gruaz. I
"talked with him in regard to the nature of the matter,
"and he talked pretty freely in regard to it, and I directed
"him to the grand jury room. He said a good many
"things. He was evidently in earnest at the time—ex-
"pressed himself pretty freely in regard to him; I would
"not like to swear to the exact words used, or that any-
"body used at the time. I can give the substance of
"what he said, I suppose. He wanted to prosecute
"Gruaz for stealing, was the amount of it. I recollect
"this: he charged him with having stolen his money, and
"I asked him how, and he told me how it had been done.
"Gruaz was his agent, and handled his funds, rented
"his farms, and had failed to account for a large amount
"of money, he told me, and he charged him in this con-
"versation with having stolen his money, and he said he
"wanted to know if there was any law in this state to
"prosecute a man for that. I have no objection to state
"any words. I remember his making the charge that he
"had stolen his money, but I can't swear that the word
"thief was used at that time; that it was in substance, un-
"doubtedly. My impression is that this was the March
"term, 1878, of Circuit court of Madison county, either
"that or October term, 1877; my recollection and de-
"cided impression is that it was spring term, 1878. Dr.
"Bircher went into the grand jury room and gave his
"statement to the grand jury. He was anxious, of
"course, to have the indictment found, and he evidently
"believed or so expressed himself." (*Ib.*, 25.)

On cross-examination the witness said:

"Major Prickett introduced Bircher to me; never saw
"him before in my life. I was certain he came to see me

"as prosecuting attorney in good faith. That was his "business, as he stated it to me. After he made his state- "ment to me I advised him to go before the grand jury; "directed him to their room. He went there by my ad- "vice. Hold on—I don't say that; I advised him that he "had a good case. He came to me and I showed him "where the grand jury room was. He stated his case "to me as state's attorney. I then directed him where to "go, and said I should prosecute it as vigorously as pos- "sible, if the indictment was found." (*Ib.*, 26.)

The plaintiff offered, and the court admitted, a large amount of evidence tending to show loss of business with the profits arising thereon to the plaintiff, as real estate and insurance agent, by reason of the speaking of the alleged slanderous words. (*Ib.*, 27, 35, 38.)

To all of which it appears that the defendant objected. (*Ib.*, 39.)

The charge of the court to the jury, with the defendant's exceptions thereto, appears from the bill of exceptions to have been as follows:

"1st. The court said: 'Gentlemen, there is one "branch of this case about which there may be a misap- "prehension I want to correct as far as I am concerned. "On the trial I admitted evidence as to the wealth of the "defendant. I did it on this ground simply, that a wealthy "and influential man, who uses slanderous words towards "another, would be likely to produce a greater effect than "the words of an ordinary man. That is the only view "under which I admitted it, and I think it should go no "further. I am, therefore, disposed to say to the jury, if "they should come to the conclusion that the plaintiff is "entitled to recover, they will not take into consideration

"the evidence in relation to defendant's pecuniary circum-
"stances in estimating the amount of damages, but what
"the plaintiff is to recover, if at all, is the amount of in-
"jury he has sustained by the slander of the defendant,
"and that he is entitled to recover, whether the defendant
"is rich or poor, no more because he is rich than other-
"wise.'

"To the giving of which instruction the defendant at
"the time excepted on the grounds that it was calculated to
"make upon the mind of the jury the impression that they
"could presume damages to the plaintiff from the words
"uttered on account of defendant's wealth, without regard
"to the proof of actual damages.

"2d. In reference to the testimony of State's Attor-
"ney C. L. Cook, the court instructed the jury as fol-
"lows:

"'I admitted that evidence with an explanation, and
"with the explanation made in the admission of it I think
"I am content, and I think the jury may take it into con-
"sideration; but if they think the defendant was actuated
"by honest motives in making the declaration he did, they
"will disregard it.'

"To the giving of which last instruction the defendant
"excepted, for the reason that the instruction ignores the
"element of want of probable cause, and for the reason
"also that the jury should have been instructed to disre-
"gard Cook's testimony entirely.

"3d. If the jury should come to the conclusion that
"the plaintiff is entitled to recover, they should give rea-
"sonable damages for loss of business and injury result-
"ing from the speaking the words, but beyond that they
"should not go."

Whereupon the jury found the issue for the plaintiff, and assessed his damages at the sum of six thousand dollars.

And thereupon the defendant, by his attorneys, viz: on the 6th day of June, A. D. 1879, moved the court to set aside said verdict and to grant a new trial in said cause, and assigned, among others, the following reasons therefor:

"1st. That the court gave improper instructions to "the jury on behalf of the plaintiff. * * * *

"3rd. That the court admitted improper evidence on "behalf of the plaintiff. * * *

"6th. That the jurors misbehaved in considering their "verdict." (Printed Rec., 63.)

After the death of the defendant, the motion for a new trial was heard and overruled, and judgment for plaintiff entered *nunc pro tunc*, as before stated. From this judgment John C. Vogel, the executor of Bircher's will, has prosecuted this writ of error, as authorized by section 9 of the act of March 3, 1875. (18 Stat. at Large, 473.)

Assignment of Errors.

First. The court erred in permitting the witness Cook to testify as to the consultation between himself as state's attorney and the defendant, with a view to the prosecution of the plaintiff on a criminal charge, and reveal the statements made to him in such consultation.

Second. The court erred in that portion of its charge to the jury relating to the statements of the defendant testified to by the witness Cook.

Third. The court erred in permitting the plaintiff to show loss of business, with supposed profits, which might have arisen thereon, for the reason that the counts of the declaration upon which the cause was tried contained no averments upon which to base any such claim for damages; and for the same reason the court erred in that portion of the charge to the jury wherein the court stated that the jury "should give reasonable damages for loss of business," etc.

Fourth. The court erred in deciding that the suit had not abated upon the death of the defendant, the pending motion for a new trial not having been heard or submitted to the court for decision before such death.

Fifth. The court erred in overruling the motion for a new trial after the defendant's death, without having had any hearing thereof during the lifetime of the defendant; and also in entering judgment *nunc pro tunc* upon the verdict after the defendant's death.

Brief for Plaintiff in Error.

I.

The court erred in permitting the State's Attorney, Cook, to testify as to statements made to him in his official capacity by the defendant.

It appears that the defendant called upon the witness C. L. Cook, the state's attorney of Madison county, Illinois, while the Circuit court and grand jury of that county were in session, and consulted him in his official capacity in respect to a charge for larceny he desired to prefer to the grand jury against Gruaz, the plaintiff. By the laws of Illinois, it is the duty of the state's attorney of each county to prosecute all indictments for such offenses within his county.

Rev. Stat. of Ill., Chap. 14, § 5.

When the plaintiff's counsel offered to prove by this witness the statements defendant had so made to him as state's attorney, defendant's counsel objected thereto upon the ground that communications made by the defendant to the state's attorney, under the circumstances stated, were privileged. It did not appear that the defendant retained or consulted Mr. Cook as private counsel; but it appeared that he consulted him as prosecuting attorney in respect to the complaint he was about to present to the grand jury. The court overruled the objection, to which the counsel for defendant excepted. The witness was thereupon permitted to state what the defendant had said to him on that occasion respecting the charges against the plaintiff, and the advice which he gave the defendant in relation to the proposed prosecution, and the fact that the

defendant then went before the grand jury to make the complaint against the plaintiff. (*Ante*, pp. 6, 7 and 8.)

In his treatise upon the law of evidence, Wharton states the law thus: "Communications made to a "prosecuting attorney, relative to suspected criminals, or "to the operations of a detective police, are privileged, "and are not to be divulged by the attorney without the "consent of the person making the communication."

1 Wharton's Evidence, § 603.

Oliver v. *Pate*, 43 Ind., 132.

In the case of *Oliver* v. *Pate*, *supra*, the Supreme court of Indiana, after discussing the rule which prohibits attorneys from disclosing communications made to them by clients, holds that the same principles are equally applicable to communications made to a prosecuting attorney under such circumstances as are here presented.

The court say: "To come more directly to the ques- "tion before us, the state furnishes an attorney to prose- "cute all persons charged with crime. It is essential that "he should be furnished with facts to enable him to suc- "cessfully prosecute. Every good citizen, it is presumed, "will aid in the conviction of offenders, and communicate "to the prosecuting attorney all the facts within his "knowledge, tending to establish the guilt of such of- "fender; and all such communications and statements "made to him must be considered and held to be privi- "leged, and must not be divulged without the consent of "the party making them. The fact that the state furnishes "the attorney can make no difference. The statement is "made to one, who for the time being, and for that pur- "pose occupies the position of legal adviser, and that "must determine the question, and not who selects or

"employs him. The prosecutor acts as attorney and re-
"ceives the communication in that capacity. Public
"policy requires that a person in making communications
"to a prosecuting attorney, relative to criminals or per-
"sons suspected of being guilty of crime, should be at
"liberty to make a full statement to him without fear of
"disclosure."

Ib. 141.
1 Greenleaf's Ev., §§ 236, 250.
Rex v. *Hardy*, 24 How. State Trials, 753.
Atty. Gen. v. *Briant*, 15 Law Jour. (N. S.), 265.

Judge COOLEY, in his treatise upon Torts, classes the following among cases of absolute privilege, thus:

"So are affidavits made for commencing proceedings
"before magistrates, and the preliminary proceedings, and
"information *taken or given* for bringing supposed guilty
"parties to justice."

Cooley on Torts, p. 214.
Allen v. *Crofoot*, 2 Wend., 515.
Hartock v. *Redick*, 6 Blackford (Ind.), 255.
Worthington v. *Scribner*, 109 Mass., 487.

In *Worthington* v. *Scribner*, *supra*, the rule excluding communications of an analogous character, made to officers of the government, is elaborately considered and fully maintained. In the opinion of the court, delivered by Mr. Justice GRAY, it is said: "It is the duty of every
"citizen to communicate to his government any informa-
"tion which he has of the commission of an offense
"against its laws. To encourage him in performing this
"duty without fear of consequences, the law holds such
"information to be among the secrets of state, and leaves

"the question how far and under what circumstances the "names of the informers and the channel of communica- "tion shall be suffered to be known, to the absolute dis- "cretion of the government, to be exercised according to "its views of what the interests of the public require. "Courts of justice, therefore, will not compel or allow "the discovery of such information, either by the sub- "ordinate officer to whom it is given, by the informer "himself, or by any other person, without the permission "of the government. The evidence is excluded, not for "the protection of the witness, or of the party in the par- "ticular case, but upon general grounds of public policy, "because of the confidential nature of such communica- "tions." * * * * * * * *

"The question now before us, is not one of the law of "slander or libel, but of the law of evidence; not whether "the communications of the defendants to the officers of "the treasury are so privileged from being considered as "slanderous, as to affect the right to maintain an action "against the defendants upon or by reason of them; but "whether they are privileged in a different sense, so "that courts of justice will not compel or permit their dis- "closure without the assent of the government to whose "officers they were addressed."

The verdict was a large one to be recovered in action for slander. The testimony of the witness Cook was of a character which would naturally aggravate and enhance the damages in the estimation of the jury.

If the court erred, either in the admission of that evidence, or in its instructions to the jury respecting the same, the verdict ought to be set aside, and the judgment entered thereon reversed.

II.

The court erred in its charge to the jury respecting the testimony given by the witness Cook.

The court in its charge said:

"I admitted that evidence with an explanation, and "with the explanation made in the admission of it, I think "I am content, and I think the jury may take it into con- "sideration; but if they think the defendant was actuated "by honest motives in making the declaration he did, they "will disregard it."

To which the defendant excepted, "for the reason that "the instruction ignores the element of probable cause; "and for the reason that the jury should have been in- "structed to disregard Cook's testimony entirely." (Printed Record, 63.)

The explanation made by the court on the admission of the testimony of this witness, thus referred to and approved in the charge, is set out in the statement of the case, *ante*, p. 6.

We insist that the exception is well taken on each ground assigned therefor.

1. The ground last specified, that the jury should have been instructed to wholly disregard the testimony of this witness is the presentation, in another form, of the question discussed under the first head of this brief. If, as we insist, the court erred in permitting the witness Cook to testify as to what statements the defendant made to him in his official capacity as prosecuting attorney, it was a repetition of the same error to refuse to instruct the jury to wholly disregard the testimony of that wit-

ness. In support of this branch of the exception, we again cite,

1 Wharton on Evidence, § 603.
Oliver v. *Pate*, 43 Ind., 132, 141.
Cooley on Torts, 214.
Worthington v. *Scribner*, 109 Mass., 487.

2. But this paragraph of the charge was erroneous in another respect. We may assume, for the purposes of the argument, that the communication was only conditionally, and not absolutely privileged, and that the state's attorney was a competent witness to prove the statements made to him by the defendant, and that those statements were properly in evidence before the jury, the same as if they had been proven by a third person who had overheard the consultation between the defendant and the prosecuting attorney. The fact would remain, however, that the statements were made to the public prosecutor, in the regular course of proceeding in and about a charge against the plaintiff for a criminal offense. If the defendant acted maliciously in preferring that charge, his liability is governed by the law relating to malicious prosecutions. To sustain an action for malicious prosecution, the law is clear, that the defendant charged with having instituted the prosecution alleged to have been malicious, must not only appear to have acted with malice, but also without probable cause. Both malice and want of probable cause must concur to sustain the action.

2 Greenl. Ev., §§ 453, 454.
Farmer v. *Darling*, 4 Burr., 1971.
Stewart v. *Sonneborn*, 98 U. S., 187, 193.
Harpham v. *Whitney*, 77 Ill., 32, 38.

The rule is the same, if, in such cases, the aggrieved party elects to sue in an action on the case for alleged libel or slander, contained in the charge so preferred against him.

The reasons of public policy which protect the party making such a complaint from liability, unless he acts both maliciously and without probable cause, apply with no less cogency where the aggrieved party elects to sue for libel or slander in making the complaint, instead of bringing an action for malicious prosecution. It is therefore held: "An action on the case for libel lies against "a party making a communication in writing to the head "of a department of the government, charging a sub- "ordinate officer of such department with peculation and "fraud of various kinds, where such subordinate officer "is subject to removal by the officer to whom the com- "munication is addressed, and the defendant acts ma- "liciously and without probable cause; but such action "though in form for a libel, is in the nature of an action "for a malicious prosecution, and the proof to sustain it "must be the same as is required in the latter action, *i. e.*, "the plaintiff is bound to show both *malice and want of* "*probable cause.*"

Howard v. *Thompson*, 21 Wend., 319.
Thorn v. *Blanchard*, 5 Johns., 508.

A professor at the United States Naval Academy, Annapolis, placed his resignation in the hands of the superintendent of the academy, to be forwarded to the Secretary of ~~War~~ Navy. The superintendent, being required by the rules of the navy department regulating his duty in the premises to indorse his opinion thereon, indorsed his opinion, stating why he thought the resignation should

be accepted, and forwarded the same to the Secretary of the Navy. It was held that an action on the case for an alleged libel contained in such indorsement could not be maintained without showing both actual malice and want of probable cause. The court say:

"We are satisfied that the communication in question "does not fall within the class of communications which "are absolutely privileged. We hold it, however, to be "privileged to the extent that the occasion of making it "rebuts the presumption of malice, and throws upon the "plaintiff the *onus* of proving that it was not made from "duty, but from actual malice, and without reasonable "and probable cause."

Maurice v. *Worden*, 54 Md., 233.
Same case, 39 Am. Rep., 384, 389.

In a case of this character, "in order to make the "writer or publisher liable, it must appear that he acted "maliciously and without probable cause. If there were "no probable cause for the communication, the law im-"plies that it was made with malice. If, however, it "appear that there was probable cause, the communica-"tion is privileged, no matter how much actual malice "dictated it."

Cook v. *Hill*, 3 Sandf., 341, 350.
1 Hilliard on Torts, 382, 383.

The objection, therefore, specified in the exception that this paragraph of the charge "ignores the element of "probable cause," was well taken, even though it should be held competent to prove the statements in question by the prosecuting attorney, to whom they were made, and that the same were not absolutely, but only conditionally privileged.

III.

The court erred in permitting plaintiff to show loss of business and profits, and in charging the jury to allow damages therefor.

A reference to the declaration will show that the first and second counts, upon which the cause was tried, contained no averments upon which to base a recovery of damages for loss of business or profits arising therefrom. (*Ante*, pp. 2 and 3).

"Even if the words are actionable in themselves and "*a fortiori* if they are not, no evidence of special damage "is admissible unless it is specially alleged in the declara- "tion, and to such special allegation the evidence must be "strictly confined."

2 Greenl. Ev., § 420.
Odgers on Slander, pp. *313, *318.

The record shows that the court not only received evidence to show loss of business and profits to the plaintiff against the defendant's objection, but instructed the jury that they should "give reasonable damages for loss of "business and injury resulting from the speaking of the "words."

We insist that the plaintiff could not legally recover special damages for the loss of business, upon the counts of the declaration upon which the cause was tried.

IV.

The suit abated, and the cause of action ceased to exist upon the death of the defendant, after verdict, and before final judgment.

BLACKSTONE says: "And in actions merely personal, "arising *ex delicto*, for wrongs actually done or com- "mitted by the defendant, as tresspass, battery and slan- "der, the rule is, that *actio personalis moritur cum per- "sona;* and it never shall be revived, either by or against "the executors or other representatives. For neither the "executors of the plaintiff have received, nor those of the "defendant have committed, in their own personal ca- "pacity, any manner of wrong or injury."

3 Blackstone's Com., 302.

Chancellor KENT thus: "Causes of action arising *ex* "*delicto*, for wrongs for personal injuries, die with the "person, and do not survive against his representatives. "Executors and administrators are the representatives of "the personal property of the deceased, and not of his "wrongs, except so far as the tortious act complained of "was beneficial to his estate."

2 Kent's Com., 416.

"For injuries to the person, if the wrongdoer die be- "fore judgment, the remedy determines."

1 Chitty Pl., 90.

The maxim is *actio personalis moritur cum persona.*

This is the common law rule, and so far as relates to actions for libel or slander, it has not been changed by the statute of Illinois, which, while it enlarges the list of actions which survive, expressly excepts slander and libel, thus:

"In addition to the actions which survive by the com-
"mon law, the following shall also survive: Actions of
"replevin, actions to recover damages for injury to the
"person (except slander and libel), actions to recover
"damages for an injury to real or personal property, or
"for the detention or conversion of personal property, and
"actions against officers for misfeasance, malfeasance or
"nonfeasance of themselves or their deputies, and all
"actions for fraud or deceit."

Rev. Stat. of Ill., Chap. 3, § 122.

Under the statutes of Illinois, in cases where "the cause "of action survives," and a sole plaintiff or defendant dies, the death may be suggested and the personal representatives of the deceased plaintiff or defendant may be made a party to the suit, and the cause will proceed the same as if brought by or against such personal represesentatives.

Rev. Stat. of Ill., Chap. 1, §§ 11, 12, 13.

And to the same effect are the corresponding provisions of the statutes of the United States regulating the practice in the Federal courts.

Rev. Stat. of U. S., § 955.

But these statutory provisions only apply to cases where the cause of action survives the death of a party.

The executor of Bircher was not, and could not properly have been made a party to this suit in the court below.

Upon the defendant's death the law not only treats the suit as having abated, but the cause of action as having died with the party. Why should not this be so? Why should mere personal controversies, feuds and contentions of this nature be kept alive, and form the subject of litiga-

tion in our courts, after one or both of the parties to them have passed to another world?

The policy of the law is, that upon the death of one of the parties thereto, all such feuds and contentions "shall "cease from troubling."

If the plaintiff's cause of action for slander has ripened into judgment, the subsequent death of either party will not defeat that judgment; but at common law the mere recovery of a verdict, in an action for libel or slander, will not warrant the rendition of judgment on such verdict after the death of either party.

Ireland, Clerk, v. *Champneys*, 4 Taunt., 884.

The case last cited is reported is follows:

"This was an action upon the case for libel. The de- "fendant first pleaded the general issue, but was after- "wards permitted to withdraw that plea and to suffer "judgment by default, upon the terms of bringing no "writ of error, and of executing a writ of inquiry before "a judge of assize, which was accordingly executed be- "fore Wood, B., at the Taunton Spring Assizes, 1813, "when the jury gave fifteen hundred pounds damages. "After that assessment, and before the next day in banc, "the plaintiff died; his executors nevertheless entered up "final judgment for the damages assessed and costs. "*Lens*, Sergeant, had on a former day obtained a rule "*nisi* to set aside this judgment for irregularity, upon the "ground that the suit had abated by the plaintiff's death "and that no statute had provided a remedy for this acci- "dent.

"*Shepard and Fell*, Sergeants, endeavored to show "cause, contending that this was a case provided for by "the statute, *17 Car. 2, C. 8*, § *1*, for that the plaintiff

"had died between verdict and judgment. It had never "been decided that this was not a case within that statute.

"But the court was clearly of opinion that the suit "had abated by the plaintiff's death; no one had ever "before thought of signing final judgment under similar "circumstances. Rule absolute."

In the subsequent case of *Palmer* v. *Cohen*, 2 Barn. and Adolph., 966 (22 E. C. L., 404), the statute was construed to embrace a case of libel; so also in the case of *Kramer* v. *Waymark*, 4 Hurlstone and Coltman's Reports (Excheq.), 427.

The statutes there quoted are as follows: The 17 Car., II, C. 8, § 1, enacts:

"For the avoiding of unnecessary suits and delays, "&c. That in all actions, personal, real and mixed, the "death of either party between the verdict and the judg- "ment shall not hereafter be alleged for error, so as such "judgment be entered within two terms after such ver- "dict."

8 Stat. at Large (Great Britain), p. 226.

This statute, although when first enacted, by its terms, was to continue in force but five years, and from thence until the end of the next session of parliament, was made perpetual by the act of 1 James II, C. 17, § 5.

8 Stat. at Large (Great Britain), p. 464.

The 15 and 16 Vict., C. 76, § 139, enacts:

"The death of either party between the verdict and "the judgment shall not hereafter be alleged as error, so "as such judgment be entered within two terms after "such verdict."

92 Stat. at Large (Great Britain), p. 311.

While these statutes are given a different effect in these later cases than in the former decision in 4th Taunton, still, taken independently of the statute, the correctness of the former ruling has never been questioned.

There would have been no necessity for these statutes, if it had not been understood that, at common law, the death of a party after verdict, but before final judgment, abated the suit.

The earliest of these statutes was enacted long subsequent to the fourth year of James the First, and neither of them was ever in force in Illinois.

Rev. Stat. of Ill., Chap. 28, § 1.

Nor has any similar statute ever been enacted in Illinois, nor by Congress, regulating the practice in the Federal courts. The common law, as it existed in England prior to the statute of 17 Car. II., before cited, is the law of Illinois upon this question. The case of *Ireland, clerk*, v. *Champneys, supra*, decided in the year 1813, shows what the common law rule was understood to be.

The Supreme court of Illinois recognized this common law rule as in force in that state in *Murphy* v. *McGrath*, 79 Ill., 594. In that case, which was trespass for assault and battery, there was a verdict for plaintiff, and a motion for a new trial, pending which the plaintiff died. The court say:

"At common law, doubtless, the action would have "abated on the death of the plaintiff before final judgment, "but by the act of the general assembly of the state, in "force July 1, 1872, it survived to the personal repre- "sentatives."

While by the Illinois statute, referred to, an action of trespass for assault and battery is made to survive, ac-

tions for libel and slander are expressly excepted. (*Ante*, p. 22.)

And it was only because the action for trespass to the person survives under the statute, that the Supreme court held that the death of a party after verdict and pending a motion for a new trial, before final judgment, did not abate the action.

It is clear that an action for slander would have abated in the courts of Illinois, under the circumstances stated above, and as they exist in the present case.

"The practice, pleadings and forms and modes of pro-
"ceeding in civil cases, other than equity and admiralty
"causes, in the Circuit and District courts, shall conform
"as near as may be, to the practice, pleadings and forms
"and modes of proceeding existing at the time in like
"causes in the courts of record of the state within which
"such Circuit or District courts are held, any rule of
"court to the contrary notwithstanding."

Rev. Stat. U. S., § 914.

In view of the statute, the practice as it exists in Illinois upon this question, must control the present case. Under that practice, as we have shown, in an action for slander, the death of the defendant, after verdict and pending a motion for a new trial, before final judgment, abates the suit.

Neither the decisions of the English courts construing or giving effect to the statutes cited above, nor the decisions of the courts of other states where statutes of the like import exist, can be considered as authority to control this case, when inconsistent with the practice in Illinois.

V.

The court erred in hearing and overruling the motion for a new trial, and in entering judgment *nunc pro tunc*, after the defendant's death.

It appears from the record, that immediately after the return of the verdict, the defendant entered his motion for a new trial, and assigned various grounds therefor, including, among others, the alleged misconduct of the jury in the consideration of their verdict. (Printed Rec., 63.)

On the 14th of June, 1879, and before this motion had been heard or submitted to the court for decision, or any further steps had been taken in the cause, the defendant died. His death having been suggested of record, the court afterwards, on the 12th day of July, 1879, assumed to hear the motion for new trial, and overruled the same, and sustained the motion of counsel for plaintiff, for judgment *nunc pro tunc*.

The hearing of the motion for new trial at that time must necessarily have been *ex parte*. After the defendant's death, it was legally impossible for him to have been represented before the court by attorneys. If his former attorneys participated in the hearing of that motion at all, it could only have been as *amici curiæ*. His executor was not, and had no right to be substituted as a party in the place of the deceased defendant, inasmuch as the cause of action did not survive, but died with the defendant. The excutor, therefore, who represented the estate was not, and could not have been heard upon that motion. Such hearing of the motion as was had, took place after the defendant's death, and for all legal purposes must be regarded as wholly *ex parte*.

If the motion had been heard or submitted to the court for decision before the death of the defendant, and held under advisement at the time of such death, the case would have been different.

The case presented by this record does not fall within the principle upon which is founded the practice of rendering judgments *nunc pro tunc*, after the death of a party. This practice rests upon the maxim, *actus curiæ neminem gravabit*. An act of the court shall prejudice no man.

Broom's Legal Maxims, 123.

The fact that the motion for a new trial was not decided prior to June 14, 1879, the date of Bircher's death, cannot in any proper sense be said to have been the act of the court, for the reason that the motion had not been heard before that date. The court had no right to decide the motion until after it had been heard. The defendant had a clear legal right to make this motion, and have it heard and decided before judgment should be entered against him.

The motion was entered in strict conformity with the practice of courts of record in Illinois. Under the practice as it exists in that state, after that motion had been made the court could not rightfully render judgment, until the motion was decided. Whatever may be the practice in some of the other states, the entry of a motion for a new trial in the courts of Illinois operates to suspend the entry of judgment on the verdict, until the motion for a new trial is disposed of.

Hearson v. *Graudine*, 87 Ill., 116, 120.

The statute adopts this as the practice of Circuit courts of the United States sitting in that state. (Rev. Stat.

U. S., § 914.) The court therefore, could neither decide the motion for a new trial, nor, by consequence, enter judgment on the verdict until after it had given the defendant an opportunity to be heard upon the motion, and so far as he was able, produce evidence in its support. He had the right to prove, if he could, the alleged misconduct of the jury. In this case not only were issues of law raised by the motion for a new trial, together with the question as to the sufficiency of the evidence to support the verdict, but a new issue of fact was raised, which the defendant had the right to have heard, and decided by the court upon such evidence as he might be able to adduce. His right to produce evidence in support of his motion, and have the same decided by the court, is as clear as was his right to introduce evidence and be heard upon the trial before the jury.

If the parties had been heard upon the motion, or the same had been submitted to the court for decision, and taken under advisement by the court, then any delay which arose thereafter might, with propriety, be regarded as the act of the court. This is the scope and extent of the well considered authorities upon the subject.

In the case of *Mitchell* v. *Overman*, 103 U. S., 62, the question is fully discussed. The court say:

"The adjudged cases are very numerous in which have "been considered the circumstances under which courts "may properly enter a judgment or a decree as of a date "anterior to that on which it was in fact rendered. It is "unnecessary to present an analysis of them, some of which "are cited in a note to this opinion. We content ourselves "with saying that the rule established by the general con-"currence of American and English courts, is *that where* "*the delay in rendering a judgment or a decree arises from*

"*the act of the court*, that is, where the delay has been "caused either for its convenience, or by the multiplicity "or press of business, either the intricacy of the questions "involved, or of any other cause not attributable to the "laches of the parties, the judgment or the decree may be "entered retrospectively, as of a time when it should or "might have been entered up. In such cases, upon the "maxim *actus curiæ neminem gravabit*—which has been "well said to be founded in right good sense, and to afford "a safe and certain guide for the administration of justice "—it is the duty of the court to see that the parties shall "not suffer by the delay. A *nunc pro tunc* order should "be granted or refused, as justice may require in view of "the circumstances of the particular case.

"These principles control the present case. Stutzman "*was alive when it was argued and submitted.* He was "entitled *at that time*, or at the term of submission to "claim its final disposition. A decree was not then entered "because the case, *after argument*, was taken under ad-"visement. The delay was altogether the act of the "court. Its duty was to order a decree *nunc pro tunc*, so "as to avoid entering an erroneous decree." (103, U. S., 64, 65.)

The following is an analysis of the leading authorities bearing on this question:

In *Clay* v. *Smith*, 3 Pet., 411, the judgment was reversed and the case remanded to the court below "with "instructions to enter judgment for the defendant there. "And in consequence of the death of Clay *while the cause* "*was held under advisement*, that it be entered *nunc pro* "*tunc* as on the first day of this term."

In *Gray* v. *Brignardello*, 1 Wall., 627, 636, the court say:

"A *nunc pro tunc* order is always admissible when the "delay has arisen from the act of the court."

In a note to 2 Daniel's Ch. Pr., p. 1016, (4th Am. ed.), the general doctrine is thus stated: "Where one of the "defendants dies *after the argument* of a cause, and be- "fore judgment, the decree will be entered so as to have "relation back as of the day of final hearing.

"The death of a defendant between the hearing of a "cause and the judgment does not render a bill of re- "vivor necessary."

Belsham v. *Percival*, 8 Hare, 158 (32 Eng. Ch. Rep., 158.)

The case of *Bank of the United States* v. *Weisiger*, 2 Pet., 481, as stated in the report, is as follows:

"In this case, which had been argued on a previous "day of the term, and the opinion of the court delivered "in favor of the appellants (see *ante* 2 Pet., 331), Mr. "Bibb having informed the court that the defendant "Weisiger had died since the commencement of the term, "stated that he had been of counsel with respondent, but "he considered that his authority had expired by his "death. He objected to the entry of the decree." [So far as appeared from this statement the death may not have occurred until after the argument.] "Mr. Sergeant, for "the complainant, moved the court to cause the decree to "be entered of a day in the term before the respondent's "death, and he cited *Davies* v. *Davies*, 9 Vesey, 461; *Camp-* "*bell* v. *Meiser*, 4 Johns. Ch. Rep., 342; *Ashburnham* v. "*Thompson*, 2 M. C. P., as fully establishing the prac- "tice according to his motion."

Mr. Bibb, *contra*:

"The court ordered the decree to be entered as of the "first day of the term."

An examination of the cases cited above by Mr. Sergeant in support of his motion, will show that they only support the conceded doctrine that where the party dies, after argument, and while the cause is under advisement, the decree or judgment may be entered *nunc pro tunc*, as of a date prior to the death; and upon principle the practice ought not to be extended beyond that class of cases.

So, "where a verdict was found, subject to a special "case, to be agreed on between the parties, but it was "not set down for argument until after the death of one "of them against whom judgment was ultimately given, "the court refused to allow judgment to be entered *nunc* "*pro tunc*, at the instance of the successful party, as the "delay in setting down the special case could not be con-"sidered as that of the court."

Doe, dem., Taylor v. *Crisp*, 7 Dowl. Pr. R., 584.

In several of the states, as in Ohio and Kentucky for example, by statute or local usage, the practice appears to be to enter judgment upon a verdict immediately upon its return by the jury, and if a motion for new trial or in arrest is made, it may be entered after the rendition of judgment on the verdict, and if sustained, has the effect to vacate the judgment previously entered.

In Ohio this practice appears to have been authorized by statute.

Dial v. *Holter*, 6 Ohio St., 228.

In Kentucky the practice originated in local usage, as appears from the opinion of the court of Appeals of that state in the case of *Turner, Admr.* v. *Booker*, 2 Dana, 334.

The opinion of the court of Appeals in the case last cited is very instructive, and throws much light upon the question involved in the present case. We, therefore, quote at length from the opinion of the court by Judge NICHOLAS:

"The defendant in error took judgment, by default, "against Turner, in an action of trespass for assault and "battery; and upon the writ of inquiry, her damage was "assessed to two thousand dollars, for which judgment "was rendered in her favor. The next day Turner, by "his counsel, moved for a new trial, on the ground set "forth in the affidavit of an agent of Turner, and because "the damages were excessive. The counsel for Mrs. "Booker moved to have the motion continued till the next "term, to afford an opportunity to take counter-affidavits, "and the counsel of Turner assenting, it was so continued. "A few days thereafter, Turner died. At the next term "of the court his death was suggested, and the motion "revived, by consent, in the name of his administrator, "the plaintiff reserving to herself all right to insist that "the motion had been abated by Turner's death, and that "the administrator had no power to revive it, in the same "manner she could have made such objection, if it had "been attempted to be revived by *scire facias*. The court "overruled the motion for a new trial, and the administrator "prosecutes this writ of error. Previous to any investi- "gation of the grounds for a new trial, we are met with "an objection on the part of the defendant in error that, "at common law all modes of suit or action abated by "the death of either party, and that they can only be "revived, for or against the representatives of a decedent, "by virtue of some express statutory provision; and as "there is none authorizing the revival of such a motion

"as this, it cannot be revived; the consequence being that "the judgment now stands freed and absolved from the "motion, as though it had never been made. According "to the course of practice in England, the motion for a "new trial was always made before judgment, and the "judgment never entered up till the motion was disposed "of. A case like this could not, therefore, well have "arisen in the English courts.

"But by a course of practice which has obtained in "this country, and which has become too inveterate to be "now called in question, the motion for a new trial is "made at any time during the term, as well after as before "judgment.

"Connected with this practice, has simultaneously "grown up another, of treating the motion, when regularly "continued over to another term, as a suspension of the "judgment till the motion is disposed of, without any "express order to that effect. It is by virtue of this "supposed suspension alone, that the court retains its "power of setting aside the judgment, for the purpose of "a new trial at a subsequent term. * "The motion "for a new trial is, therefore, a mere incident to his suit, "of almost the identical same character it would have "been if made before judgment, and can, with no plausi- "bility, be put upon the basis of a separate, independent "suit, upon which the learned counsel endeavored to place "it, requiring the action of the representative of the mover, "to obtain either its revivor or the benefit of its suspending "powers upon the judgment.

"If the administrator had not voluntarily appeared and "assented to the revivor, the plaintiff would have been "bound to become the actor, and by *scire facias* against

"the administrator, put the case in an attitude to have the "motion disposed of, and her judgment freed from its still "controlling effect.

"Having thus freed the case from this supposed diffi- "culty, we are met by an objection on the other side, that "such being the admitted effect of the motion, it must be "by virtue of a sort of *nunc pro tunc* process, which will "give it relation, and make it take effect as though it had "been actually made antecedent to the entering up of the "judgment; the inevitable result of which would be, to "abate the whole suit, inasmuch as the cause of action "does not survive.

"This assumption has no more of solid merit than the "other. It is needless to unravel the argument by which "it is attempted to be sustained, in order to expose its "fallacy. The suspending effect given to the motion, "made after judgment, is *sui generis*; it is based upon "none of the analogies of the law that we know of, and "is the mere creature of an anomalous practice in this "state, too old to be disturbed. Its effect reaches only so "for as it has obtained allowance, *ex necessitate*, in the "furtherance of justice."

The rationale of the opinion in this case is, that if the motion for a new trial had been actually made before the entering of judgment, the inevitable result would have been "to abate the whole suit; inasmuch as the cause of "action does not survive." But in view of the fact that judgment had been rendered on the verdict in the life-time of the defendant, and before the motion was made, the subsequent entry of that motion, while it temporarily suspended, did not vacate the judgment; and that after the death of the defendant the pending motion could not be

heard and determined until his administrator had been made a party; and this having been done, it was competent for the court to hear and decide the motion.

The manifest application of these principles to the present case, shows that the court below erred in not holding that the suit abated upon the death of the defendant before judgment, and after such death, assuming to hear the motion for new trial *ex parte*, and in overruling the same, and entering judgment, as of a date prior to his death.

Extreme cases may be found and cited by counsel for defendant in error, where the practice of entering judgments *nunc pro tunc* has apparently been carried beyond the spirit and meaning of the maxim and principles underlying that practice, viz.: that the act of the court shall prejudice no one.

A careful examination, however, will show that such cases rest upon special circumstances, or conditions of local law, not applicable to the present case.

For example: The case of *Dial* v. *Holter*, 6 Ohio St., 228, is as strong a case, probably, as any that can be cited against us. It was an action for libel and slander. A verdict had been found for the plaintiff, upon which, in accordance with the practice in Ohio, judgment was immediately entered for the plaintiff. Afterwards, and at the same term of court, the defendant entered a motion in arrest and for a new trial. Before these motions were heard or disposed of, the defendant died. Several appeals were prosecuted, the details of which it is unnecessary to notice. Suffice it to say, that it was ultimately held that the administrator of the deceased defendant, under the law of Ohio, was entitled to be made a party to the suit to represent the estate; and this having been done, it was

held that the motions for new trial and in arrest, could be heard and overruled, and final judgment entered as of a date prior to the death of the original defendant.

It will be observed (1), that judgment upon the verdict had been entered against the defendant before his death, although his motions in arrest and for a new trial, were pending when he died. The death of the defendant under such a condition of the record, could only abate these motions (if anything), and thus leave the judgment previously entered in full force. In the present case there had been no judgment against the defendant at the time of his death.

(2.) In the case cited it was held not only proper, but necessary, in view of the condition of the record in that case, to make the administrator of the deceased defendant a party to the suit in the trial court, and this was done. Under the law of Illinois it would have been improper to have made the defendant's executor a party to the suit in the Circuit court, and it was *not* done. In the case cited, the administrator having been made a party to the suit, the hearing of the motions was not *ex parte*. As we have shown, it was otherwise in the present case.

(3.) In the case cited the motions in arrest and for new trial were based exclusively upon the questions of law or matters which had arisen in the course of the trial, and were already before the court. In the present case, one of the grounds assigned for the motion for a new trial raised a new issue of fact before the court, in support of which the defendant had the right to introduce evidence which had not been offered on the trial before the jury.

In all these essential particulars the two cases differ. The ruling in the case cited cannot, therefore, be regarded as authority to govern the present case.

From our examination of the subject, we feel warranted in saying that no case can be found—where the circumstances surrounding the same, the condition of the record, or the local law, were not in some of the particulars indicated above, essentially different from the present case—in which it has been held that a motion for a new trial might be heard *ex parte*, and overruled, and judgment entered on the verdict after the death of the defendant.

The questions here presented, and the difficulties here encountered, could not arise in states like Ohio, Kentucky or California, where the practice is understood to be to enter judgment upon a verdict immediately upon its return by the jury, and thereafter to enter a motion for new trial, which if sustained would operate to vacate the judgment previously entered.

Nor would the question here presented arise in a case reserved for decision by the court in banc on exceptions, nor upon motion for new trial based upon error of law or matters already appearing in the record, nor in any case where the administrator of the deceased party had the right to be made a party to the record, and heard upon the question before the motion was decided; nor could it arise in a case where the party who had recovered a verdict in his favor had died while a motion for new trial was pending, and the opposite party was living to be heard upon, and present evidence in support of his motion.

To sustain the ruling of the Circuit court in this case it must be held competent for a court—not merely to decide, after the death of one of the parties, questions submitted and taken under advisement before such death—but after such death to actually hear, for the first time, and determine questions of law and fact not submitted to the court for decision while the parties were living; and this, with-

out the presence of any one authorized to represent the estate of the decedent. Our entire system of judicial proceedings contemplates that parties shall have an opportunity to be heard before the courts in person or by counsel, and especially to present evidence upon questions of fact pending in such courts, before judgment shall be pronounced against them. In the present case, this fundamental principle was disregarded. The dead man could neither appear in person nor by counsel; and his executor was not made a party, and had no right to be made a party, in that court, inasmuch as the cause of action did not survive.

The law regards the action as having abated by reason of the death of defendant, and says that the cause of action died with the defendant. The law, for wise purposes, we think, places actions of this kind, libel and slander, under a ban, and says they shall not survive the death of either party.

Why should the courts carry the fiction of *nunc pro tunc* orders to such an extent as to derprive the party of the right to a hearing upon the questions of law and fact in dispute, in order to keep alive and render final judgment upon a cause of action which the law denounces as dead? The decisions of this court afford no countenance to any such practice. They merely support the reasonable rule that where a question has been heard and submitted to the court for decision, and taken under advisement while the parties were living, if one of them dies before the decision is announced, judgment may be entered as of a date anterior to such death, in order that the benefit of the fruits of the litigation may be preserved to those entitled thereto.

It is manifestly dangerous to extend the practice beyond this reasonable limit, and permit questions of this character to be heard and tried *ex parte*, after death has terminated the jurisdiction of the court as to one of the parties.

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No. 209.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

JOHN C. VOGEL, EXECUTOR OF RUDOLPH BIRCHER, DECEASED,
Plaintiff in Error,

vs.

TIMOTHY GRUAZ,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

H. S. GREENE,
F. W. BURNETT,
Counsel for Defendant in Error.

SPRINGFIELD, ILLINOIS.
H. W. ROKKER, PRINTER AND BINDER.
1883.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

Briefly stated, the history of the case is this: The defendant in error, on February 26, 1878, brought suit in the circuit court of Madison county, against Rudolph Bircher, claiming damages at $10,000 in an action on the case for slander. Bircher being a resident of Missouri, had the cause removed to the Circuit court of the United States for the Southern District of Illinois.

After a number of continuances in that court, had on the application of Bircher, the trial of the cause was commenced June 4th and ended June 6th, 1879, resulting in a verdict for the plaintiff for $6,000.

Of course, the findings of the jury or the correctness of the verdict, as to the amount or otherwise, cannot be questioned in this court, yet we may say that the evidence, all of which is preserved in the bill of exceptions contained in the record, shows the verdict of the jury to have been fully justified, and Judge Treat, who heard the cause, refused to grant a new trial. Defendant in error, Gruaz, lived in Highland, Illinois, thirty miles from St. Lonis, the home of Bircher. Gruaz' business was that of agent, real estate, insurance, collecting rents for non-resident land owners, etc. Bircher was a man of immense wealth, proprietor of the Laclede hotel in St. Louis, was well known in Highland, near which place he owned valuable real estate, the collection of rents from which he had for a number of years entrusted to Gruaz, as agent. In 1877, Bircher came to Highland and claimed that Gruaz had embezzled or stolen a thousand dollars or more of his money. He repeatedly denounced Gruaz as a thief, and published a notice in the village paper warning people not to pay any further moneys to Gruaz. Bircher then went to Edwardsville, the county seat, and attempted to procure the indictment of Gruaz for larceny,—embezzlement, under the Statute of Illinois, being made larceny and punishable as such. He was advised by the prosecuting attorney to first bring a civil suit and obtain judgment. The suit was brought, and the testimony of M. G. Dale, judge of the court where the cause was tried (printed record, 58) shows how utterly without foundation were all the charges against Gruaz. It appeared that Bircher had failed to give Gruaz

credit for $1,000 or more, for which Gruaz possessed drafts or checks indorsed by Bircher, upon the production of which in court Bircher was compelled to admit the receipt of the money represented by them. When the present suit was tried, Bircher attempted to show the bad reputation of Gruaz in mitigation of damages, but the evidence in rebuttal as to his good reputation, prior to the assaults of Bircher, was overwhelming.

The verdict was unusually large, but the offense of the defendant was extraordinary. It was the deliberate, persistent attempt of a man of great wealth and consequent influence, wholly without cause or provocation, to destroy the good reputation of one who had no other dependence for a livelihood. Bircher's offense must have been malicious, because he knew his charges to be false. These and other facts in the case were the cause of the large verdict, which received the sanction of the trial court.

Upon the coming in of the verdict, the defendant entered a motion for a new trial, pending which the defendant died. Afterwards the court, having overruled the motion for a new trial, entered a judgment *nunc pro tunc* on the verdict, as of the time of the coming in of the verdict. This writ of error was sued out by Bircher's executor, plaintiff in error.

Nine errors are assigned upon the record, each of which we will discuss in the order of the assignment.

"I. *That the court below erred in the reception and admission of evidence on the part of plaintiff below.*"

Not having seen the brief of counsel for plaintiff in error, we do not know what specifications will be made or relied on under

this assignment; but the record shows that during the whole progress of the trial but *three* exceptions were taken to the introduction of evidence on the part of plaintiff below. The first exception taken is found on page 24 of the printed record. A witness, Weinheimer, was asked as to a conversation held with the defendant below in St. Louis, Missouri. This was objected to, counsel saying that they understood "the statute of Missouri on the subject of slander to be different from that of Illinois, and if it was not slander where the language was uttered, it could not be where it was not uttered." The court overruled the objection, saying slander was not a local action. The action was not brought under any statute, but as at common law. The words charged in the declaration had already been proved to have been spoken in Illinois, and Weinheimer was called to narrate similar language spoken to him by defendant when in St. Louis. There is no statute in Illinois regulating civil actions for slander, or providing what words shall or shall not be actionable, and we know of no such statute anywhere; certainly none was shown to exist in Missouri. An action on the case for slander is certainly not a local action; and we can discover no ground whatever for the objection. It is frivolous and not worthy of serious consideration.

2. The next exception taken is found on page 27 of the printed record. The plaintiff below was asked the question: "What has been your income from your business prior to 1877?" To this counsel for defendant objected "on the ground that the books would be the best evidence."

We are at a loss to know why it was thought necessary to produce the plaintiff's books upon this question. The fact he was asked to state was the amount of his income prior to 1877.

This fact might or might not appear from his books. There was nothing to show that the record of his income was kept in any books. Even if the plaintiff had kept books showing the amount of his income, it was not necessary to produce them if he remembered the fact independently of the books.

The witness was not asked as to the contents of any books, or of any writing whatever. No reference was made to books by the question. He was asked to state a fact which, if within his knowledge, he knew independently of any books. The books, if any existed, were not the best evidence of this fact, and would not have been admissible, if offered. The witness answered that his income prior to 1877 had varied from $2,500 to $3,500. In thus answering, he does not pretend to be giving the contents of his books. He testifies to a *fact* within his knowledge, and known to him irrespective of his books. It does not even appear that he kept any books containing a statement of the amount of his income. Upon what principle then can it be claimed that "the books were the best evidence?

The specific objection made to this question is absurd upon its face, and we cannot believe that the learned counsel for plaintiff in error will insist there was error in overruling it.

If it should be insisted that the question was improper for other reasons than the one specified at the time of making the objection, the answer is that it is now too late to allege any other ground of objection than the one specified. This court has frequently so decided.

In the case of *Evanston* v. *Gunn*, 99 U. S. 665, this court said:

"The admission in evidence of a record kept by a person employed by the United States signal service at Chicago, was

objected to at the trial, not because it had not been properly made, identified and proved, but for the alleged reason that there was no law authorizing such records to be used in evidence, and because it was not competent testimony. The defendants having thus specified their objection, *it must be considered that all others were waived*, or that there was no ground upon which others could stand. *Berks* v. *Dauphin*, 6 Serg. & R. (Pa.) 12; *Chicago & Alton R. R. Co.* v. *Morgan*, 69 Ill. 492. We have, then, only to consider the objections that were made, —the only ones that appear in the bill of exceptions."

To the same effect are the following:

Belk v. *Meagher*, 104 U. S. 279.

Clark v. *Fredericks*, 105 U. S. 4.

Edwards v. *Elliott*, 21 Wall. 532.

It is possible that the counsel may in this court point out other reasons than that specified on the the trial, why the question as to the income of the plaintiff should not have been allowed. If so, the decisions above cited present a complete answer to all that may be said as to such other objections.

The question above referred to was the only one put to the witness to which exception was taken during the trial.

3. The only remaining exception taken on the trial to the introduction of evidence, on the part of the plaintiff, was the testimony of *Cook*, prosecuting attorney. This, however, is made the ground of a separate assignment, which will next be considered.

"II. *The said court erred in permitting the plaintiff to prove by the witness C. L. Cook, statements and complaints made by the defendant to him as State's Attorney of Madison county, Illinois, to procure an indictment against plaintiff below.*"

Cook's testimony is found on page 25, of the printed record. He testified that the defendant below sought him as prosecuting attorney for the purpose of procuring an indictment against

Gruaz, and that in the conversation defendant charged Gruaz with being a thief, with having stolen his money, etc. In overruling the objection to this the court said: "Of course, if he gave the communication to the witness in good faith, there would be no malice about it, and I shall instruct the jury to disregard it." And at the close of the testimony, the court did instruct the jury, that if they thought the defendant was actuated by honest motives in making the declaration to Cook, they should disregard it.

If there exists any principle of law making such a communication privileged, when made in good faith, it certainly does not extend to communications made with malice. It seems to us the instructions of the court, which left to the jury the question of the good faith of the communication, and instructed them to disregard it, if they believed it to have been made in good faith, was certainly as much as the defendant had a right to ask. It had already been shown by Boeschenstein and other witnesses, that the defendant had denounced the plaintiff as a thief months prior to the attempt to indict, and Cook's evidence merely went to show that the defendant was persisting in his charges, and attempting to procure an indictment against the plaintiff. He went to Cook not as to an attorney, but as an officer of the law. It will certainly not be claimed that the relation of attorney and client was created; no employment as such was had,—no attempt made to create such relation. In the prosecution of his designs against the plaintiff, the defendant went to Cook as an officer of the law, whose duty it was to prosecute criminals, and alleged that Gruaz had stolen from him. He went farther than was necessary for such purpose, and denounced Gruaz as a thief.

As is said by Townsend on Slander, 3d edition, page 350, section 209: "The description of cases recognized as privileged communications, must be understood as exceptions to the rule that every defamatory publication implies malice, and as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may be fairly presumed to have led to the publication, and therefore *prima facie* relieves it from the just implication from which the general rule of law is deduced. The rule of evidence as to such cases is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligation and situation of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. * * * The malice required to deprive communications of this sort of the protection arising out of the occasion of the speaking of the words, must be such as to induce any reasonable person to draw the inference that the occasion has been taken advantage of to give utterance to an unfounded charge."

In other words, under the circumstances named, the presumption of malice gives way to the presumption of good faith.

If the jury did regard this testimony, they must have found that the communication was not made in good faith, and their finding is conclusive here. If they disregarded it, and we have no means of knowing whether they did or did not disregard it, then it worked no injury to the defendant. There was ample evidence, to which no exception was taken, to prove the speaking of the slander, independent of the testimony of Cook.

That the true test in such cases is that of good faith, is further shown by the following from Townsend on Slander, page 413, sec. 237:

"Every one who is aggrieved, or who has reasonble or probable cause to believe himself aggrieved, *may in good faith*, seek redress from any body, officer or individual, having jurisdiction, power or authority [directly or indirectly] to redress the wrong or supposed wrong."

If there is any principle which would make the communication to Cook privileged under any circumstances, it is the one referred to in the above quotation from Townsend, and it is stated with the express qualification that such communication should be made *in good faith*. Will the learned counsel contend that it should be privileged if made in bad faith, if made with malice, with full knowledge that the charge he was thus presenting was unfounded in fact? Will they contend that it is privileged when made deliberately, falsely and with the purpose of bringing the accused into disgrace? When made not to redress a wrong, or to bring one to justice when reasonable ground exists to believe him guilty of a crime, but to gratify a personal spite or personal malice? We think not, and we think the counsel must admit that when the court below admitted the testimony, leaving to the jury the question as to whether the communication was made in good faith, the court did exact justice as between the parties, and that there was no error in his ruling.

The court is also referred to *State* v. *Van Buskirk*, 59 Indiana, 384, where it is held that communications to the prosecuting attorney are not privileged.

"IV. *The court erred in not sustaining the motion of defendant to exclude proof of alleged slanderous words not alleged in the first and second counts of the declaration.*"

There is absolutely nothing in the record upon which to base this assignment. No exception whatever was taken to the evidence produced as to the speaking of the words complained of. On page 23 it appears that a motion was made to exclude the testimony of Boeschenstein in relation to the word "Betrueger," but no exception was taken to the ruling of the court on this motion.

No assignment of error can properly be made as to the ruling of the court below to which no exception was taken. It is not sufficient merely to object to the testimony or to the ruling of the court.

"It appears that the admission of a part of the testimony was objected to, but does not appear that the objection was overruled and exception taken. It only appears that the testimony was admitted after the objection was made. *Non constat*, but that the objection was waived or the decision acquiesced in. In order to make such a point available, it is necessary that exception should be distinctly taken and placed on the record."

Laber v. *Cooper*, 7 Wall. 570.

"V. *The court erred in excluding evidence offered by the defendant below.*"

In answer to this assignment it is sufficient to say that no evidence offered by the defendant below was excluded by the court, and of course the record contains no exception on that account.

"VI. *The court erred in its instructions and charge to the jury, that is, in the portions and paragraphs of said numbered 1st, 2d and 3d, set out in the bill of exceptions.*"

The instructions are printed on pages 62 and 63 of the record. It does not appear that any requests were made of the court

as to his charge, and defendant therefore cannot complain tha the jury were not instructed more fully or as to other points.

Express Co. v. *Kountz Bros.*, 8 Wall. 342.

As to paragraph 3d of the charge, no exception was taken thereto, and hence it is unecessary to consider it.

Railway Company v. *Twombly*, 100 U. S. 78.

The second paragraph relates to the testimony of Cook, and has already been considered under the second assignment, *supra*. The ground of the objection to this paragraph is not stated.

The first paragraph relates solely to the evidence that had been introduced, as to the wealth of the defendant, (to the introduction of which no exception was taken), and cautions the jury not to award damages against the defendant because he is wealthy. The only view under which the evidence was admitted, the court says, was that the words of a wealthy and influential man would be likely to produce a greater effect than the words of an ordinary man. And the court adds: "I am therefore disposed to say to the jury, if they should come to the conclusion that the plaintiff is entitled to recover, they will not take into consideration the evidence in relation to defendant's pecuniary circumstances in estimating the amount of damages, but what the plaintiff is to recover, if at all, is the amount of injury he has sustained by the slander of the defendant, and that he is entitled to recover whether the defendant is rich or poor, *no more because he is rich than otherwise*."

The defendant had permitted the evidence of his wealth to go to the jury without exception, and the court sought by this portion of the charge to *limit* the effect of that evidence. The limit fixed by the court was far more favorable to the defendant than the law would authorize. In this case, exemplary

damages were clearly allowable. In such case, "the defendant's pecuniary ability is then a matter for the consideration ot the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger." See Southerland on Damages, vol. I, page 745, and numerous cases there cited. Yet the court said the jury could give no more damage because the defendant was rich than otherwise. It is manifest that if there was error in this, it was to the prejudice of the plaintiff, and not of the defendant.

The rule, as stated by Greenleaf, vol. 2, sec. 269, is this: "The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive. But so far as the defendant's rank and influence in society, and therefore the extent of the injury, are increased by his wealth, evidence of that fact is pertinent to the issue." See also, Southerland on Damages, vol. III, sec. 653, *et seq.*, where numerous authorities are cited in support of the same doctrine.

The rule is clearly founded on common sense. It is manifest that a man of wealth and consequent influence, who is known to be able to respond in damages for his acts, can, by denouncing another as a thief, do him more injury than one wholly irresponsible financially. It is shown by the evidence (Osthoff, page 34) that Bircher was well known to the citizens of Highland, the home of plaintiff, where the slander was spoken, and was reported as a very rich man. Of course the statement of such a man would have more weight in the community than that of a tramp, or of a man wholly without wealth or position. If so, why should not the jury be authorized to take such fact into consideration in estimating the extent of the injury?

As we have seen such evidence is also admissible upon the other ground, viz, as showing the ability of defendant to pay, in cases where exemplary damages are allowable, but the court did not go so far here.

The specific objection made to this paragraph (and therefore the only objection which it is necessary to consider) is "that it is calculated to make upon the minds of the jury the impression that they could presume damages to the plaintiff from the words uttered on account of defendant's wealth, without regard to the proof of actual damages."

The jury had a right to presume damages from the words uttered, without regard to proof of actual damage.

"There is no legal measure of damages in action for such a wrong. The amount which the injured party ought to recover is referred to the sound discretion of the jury. The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken into account, and what are fair considerations to influence their judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into consideration the nature of the reputation, the extent of its publicity, the character, condition and influence of the parties. When the publication is actionable *per se*, the legal presumption of damages goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford proper reparation."

III Southerland on Damages, 642.

,,There is a conclusive presumption of malice from falsely speaking words actionable in themselves, unless a legal justification or excuse is shown. The malicious intent of a slander or libel is not a question of fact; it is a conclusion of law. As the injury will be aggrevated by showing more malice than the law implies from mere proof of defamation alleged, the plaintiff may prove any circumstances which tend to magnify the malice, they will tend not only to confirm as true in fact what the law so presumes, but they may also show that the

wrong and injury did not result from mere heedless and aimless gossip, but a malevolent eagerness to inflict pain and destroy reputation by originating or giving currency to a conscious fabrication."

Ibid, page 650.

For words actionable *per se*, an action will lie without any allegation or proof of actual damages, because it is legally presumed that they cause injury, as a natural and immediate consequence.

Cooley on Torts, 203.

There is no question but that the words proved here were actionable *per se*. Defendant said plaintiff was a thief, etc. Although he meant thereby to charge that the defendant had embezzled his money. the charge was no less that of felony, as embezzlement by an agent is made larceny by the Statute of Illinois.

Sec. 75 Criminal Code Illinois.

"Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject."

Townsend on Slander, 3d ed., p. 185.

In what sense the words were understood was, with all other questions of fact, submitted to the jury, and their finding is, of course, conclusive.

In such cases, no proof of actual damages is required. "And in assessing damages, the jury may consider the pecuniary circumstances and standing of the defendant, the character of the plaintiff, the reiteration of the slander at different times and to different persons, the endeavor to have plaintiff indicted, and

the attempt to prove the truth of the charge, the probable counsel fees of plaintiff and expense in prosecuting the suit, and they may give exemplary damages."

Habison v. *Shook*, 41 Ill. 142.

Freeman v. *Tinsley*, 50 Ill. 497.

Hatch v. *Potter*, 2 Gilman, 725.

Spencer v. *McMasters*, 16 Ill. 405.

Wheeler v. *Randall*, 48 Ill. 182.

Sedgwick Measure of Damages, 35, 97, 455.

"In slander and libel, no proof is necessarily required of the injury from actionable words. *Plaintiff is eutitled to such amount as the jury see fit to give.*"

Sedgwick, 465.

"In all actions for tort and actions sounding in damages, the question of the extent of the damages is almost exclusively for the jury. It is for the jury to determine from all the circumstances, what damages ought to be given, and are not confined to mere pecuniary loss or injury."

Spencer v. *McMasters*, 16 Ill. 405.

Freeman v. *Tinsley*, 50 Ill. 497.

Although some evidence of actual damage was introduced on the trial below, *without exception by defendant*, yet the verdict does not rest upon such proof, as is shown by the foregoing citations. It was within the province of the jury to find the verdict they did, irrespective of proof of actual damages.

That the amount of the verdict is excessive cannot be assigned for error.

Wabash Ry. Co. v. *McDaniel*, 107 U. S.

"VII. *The court below erred in overruling the motion that the suit abate by reason of the death of defendant below.*"

"VIII. *The court below erred in proceeding with the hearing and decision of the motion for new trial after the death of defendant below.*"

"IX. *The court erred in rendering judgment against the defendant below, after his death, as shown by the record.*"

The above assignments all refer to the same matter and will be considered together. The question is, did the suit abate upon the death of the defendant after verdict, or did the court have power to enter judgment *nunc pro tunc*, as was done.

Upon the coming in of the verdict, the plaintiff was, as a matter of course, entitled to judgment for the amount of the verdict, and it would have been so entered but for the interposition of the motion for a new trial by the defendant.

In fact, under the practice as contemplated by section 987, Revised Statutes of the United States, the judgment should be entered upon the coming in of the verdict, subject to be set aside upon the granting of a motion for a new trial. If, under that, a proper practice, the judgment had been so entered here, no question could have arisen as to abatement by the subsequent death of the defendant.

If then, it was in the power of the court to have entered the judgment at that time, notwithstanding the motion for a new trial, how can it be said that the defendant was injured by the subsequent entry of the judgment as of the day it should properly have been entered?

But the entry of judgment upon the verdict was delayed, either by the act of the court, or by the act of the defendant in interposing the motion for a new trial, or of both combined,

as it was because of defendant's motion that the court postponed action. The hearing of this motion was, by the court, (see judgment, printed record, page 17) "postponed to a then future and convenient day of the said June term, A. D. 1879, of the court, and pending the hearing of said motion so postponed as afore said, the defendant, and on the 14th day of June aforesaid, departed this life."

"The policy of entering judgments and decrees *nunc pro tunc* is agreeable to the maxim '*actus curie neminem gravabit.*' An act of the court shall prejudice no one. This maxim, says Mr. Broom, 'is founded in justice and good sense, and affords a safe and certain guide to the administration of the law.' As an expression of the principle upon which judgments are given effect, as of some time prior to their actual entry, the maxim, in the interest of accuracy, requires to be changed to a delay of the court, shall prejudice no one, and to be limited in its application, so as to affect none but the parties litigant. The power of making an entry *nunc pro tunc* seems to have been possessed and exercised by courts of law and equity from the earliest times."

Freeman on Judgments, sec. 56.

The rule is the same when the delay of the court is due to the motions of the opposite party.

"Besides the delay occasioned by the deliberations of the judge after the argument of a cause, the prevailing party was likely to be tied up by various motions, whose pendency deprived him, for a time, of the fruits of his litigation. The consideration of these subjected him to the same peril, and entitled him to the same relief, as though he were endangered by being compelled to await the decision of the judges after the argument on the trial. Hence, if during the pendency of a motion in arrest of judgment, or for a new trial, whether after verdict or non-suit, or demurrer, or writ of error; or if pending the decision of questions of law, which could not be heard on account of press of business in court, one of the parties die, the other may have judgment entered as of some term during the lifetime of his opponent."

Freeman on Judgments, 3d ed., sec. 56.

Tidd's Prac., 8th ed., 965.

Griffith v. *Ogle*, 1 Binney, 172.

Brown v. *Wheeler*, 18 Conn. 199.
Spalding v. *Congdon*, 18 Wend. 543.
Ryghtmire v. *Durham*, 12 Wend. 245.
Currier v. *Lowell*, 16 Pick. 170.
Tooker v. *Duke of Beaufort*, 1 Burr. 147.
North v. *Pepper*, 20 Wend. 677.

This rule is so evidently founded upon just principles, that although the cases are numerous where the rule is affirmed, there is no case, of which we are aware, that in any manner calls it in question. In the present case, the plaintiff had brought suit to redress what he considered a grievous injury; the issue between himself and the defendant was submitted to a jury, and a verdict rendered and recorded in favor of the plaintiff. The plaintiff had, then, prosecuted his suit to a successful issue, and it only remained for the court to pronounce the judgment of the law upon the verdict. The action of the court was delayed, not by any act of the plaintiff, but by the act of the court, in postponing the hearing of defendant's motion. It appearing by the subsequent decision of the court, that there was not sufficient ground for the motion for the new trial, and that the plaintiff was, in the judgment of the law, entitled to recover of the defendant according to the verdict, why should the plaintiff be deprived of such recovery, when the delay was caused not by any fault of the plaintiff, but solely by the act of the court or of the defendant himself? It would be the height of injustice to thus defeat the recovery, and cast the burden of paying the costs of the litigation upon the plaintiff.

If the defendant had died before the verdict, there is no pretense but that the suit would have then abated. An action on the case for slander is left by the Statutes of Illinois precisely

as at common law. The Statute does provide that certain actions, which abated at common law, shall not now abate, but may be revived against the personal representatives of the deceased. But this action is not thus provided for by the Statute, and is therefore left as at common law. The decisions we have cited are applicable to this class of cases, viz, those that do abate, and no other; because where the action could be revived there would be no necessity for the rule.

In the case of *Dial* v. *Halter*, 6 Ohio State, 228, the point was made that the rule did not apply to an action for slander, because such action abated. We quote from the argument of Judge Thurman, of counsel for plaintiff in that case:

"Mr. Joliffe insists that a judgment *nunc pro tunc* cannot be entered in an action for slander, because such action abates by the death of the defendant. A strange point. The very reason for a judgment *nunc pro tunc* is that the action abates by death, and therefore, such a judgment is necessary to do justice. At common law, all personal action abated by death, and it was for this reason that judgments *nunc pro tunc* were invented. Were there no abatement, there would be no necessity for such a judgment, for the personal representative of the decedent might be made a party, and judgment be given against him. Judgments *nunc pro tunc* rest upon a most solid foundation of justice, for it would be manifestly unjust, that a party who had by the verdict of a jury established his right to recover, should be deprived of it by delay in entering judgment occasioned not by his fault, but by the course of his adversary or the act of the court."

The case in which this argument was made was precisely parallel in all essential particulars with the case at bar. It was a suit for slander, and verdict rendered for plaintiff. A motion for a new trial and in arrest of judgment was made. Before the motions were heard or disposed of, the defendant died. The court said:

"Personal actions by the common law as well as by our statute, abate by the death of the party. If before verdict,

such an event happened to one of the suitors, the case is brought to an end. *But if after verdict and before judgment* he dies, the rule is different. The right to recover being established, and the amount of damages determined by the verdict, it shall continue in force, and a judgment may be given upon it as of the term when it was rendered." The court cites a number of authorities and adds: "These and other cases to the same point, proceed upon the supposition that judgment might, and undoubtedly would, have been entered for the plaintiff in time, had it not been for the delay occasioned by the defendant in filing his motion for a new trial, and that when the motion does not prevail, it ought not to work any prejudice to the rights of the plaintiff."

To the same effect also are—

Blaisdell v. *Harris*, 52 N. H. 191.
Topley v. *Martin*, 116 Mass. 275.
Gray v. *Thomas*, 12 S. & M. 111.
Isler v. *Brown*, 66 N. C. 556.
Collins v. *Prentice*, 15 Conn. 423.

Two very recent decisions of this court are also to the same effect.

Mitchell v. *Overman*, 103 U. S. 62.
Coughlin v. District of Columbia, 106 U. S. 7.

In the case of *Mitchell* v. *Overman*, this court, by Justice HARLAN said, (page 64:)

"The adjudged cases are very numerous in which has been considered the circumstances under which courts may properly enter a judgment or a decree as of a date anterior to that on which it was in fact rendered. We content ourselves with saying that the rule established by the general concurrence of the American and English courts is, that when the delay in rendering a judgment or a decree arises from the act of the court,

that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, *or of any cause not attributable to the laches of the parties*, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. A *nunc pro tunc* order should be granted or refused as justice may require, in view of the circumstances of the particular case."

In the case in 106 U. S. 7., it was held that "when a judgment for the plaintiff in a personal action was erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the first judgment *nunc pro tunc*."

The cases to be cited by the plaintiff in error, if we can judge by what was cited below, do not in any manner conflict with what has been said or cited in support of our position. In some of these cases the judgment was, in fact, rendered as of a date subsequent to the death. In others, the case was not in condition for rendering final judgment. For example, *Faith* v. *Carpenter*, 33 Georgia, 79, which was cited below, an *appeal* had been taken to another court, when the case was pending for another trial by special jury, at the time of death. The court held that the appeal opened the whole case, and the case stood as if it never had been tried. Of course, the death of defendant before the second trial abated the suit.

We respectfully submit to the court that there is no sufficient reason why the judgment of the circuit court should not be affirmed.

H. S. GREENE,
F. W. BURNETT,
Counsel for Defendant in Error.

No. 209.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1883.

JOHN C. VOGEL, EXECUTOR OF RUDOLPH BIRCHER, DECEASED,
Plaintiff in Error,

VS.

TIMOTHY GRUAZ,
Defendant in Error.

ADDITIONAL BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1883.

VOGEL, Executor,
Plaintiff in Error,

AGAINST

TIMOTHY GRUAZ,
Defendant in Error.

No. 209.

Additional Brief for Defendant in Error.

Since our former brief was printed we have received a copy of the brief for plaintiff in error. The counsel have abandoned a number of the assignments of error upon the record, which were discovered by us, and now as ground of reversal, rely only upon the following:

1. The alleged error in regard to the admission of the testimony of Cook, State's attorney, and the charge of the Court thereon.

2. The alleged error in admitting evidence of loss of business and the charge of the Court thereon.

3. The alleged error in the entry of judgment *nunc pro tunc*.

I.

The position taken in regard to Cook's evidence is, first, that the communication was privileged abso-

lutely; second, that if only conditionally privileged, the charge of the Court is erroneous, as ignoring want of probable cause. The counsel must have been greatly embarrassed while preparing this portion of the argument, because while they insist under the first branch thereof that the communication was absolutely privileged, they are compelled to cite and do cite under the second branch numerous authorities to the effect that such communication is only conditionally privileged.

We may admit that affidavits made for commencing proceedings before magistrates, the testimony of witnesses given in Court, communications to the prosecuting attorney *in cases pending*, are absolutely privileged; and also communications to an officer of the Government concerning a matter in which the Government has a direct interest; and that is the utmost the authorities cited warrant. But such admission does not affect the question here.

In the first place, the communication to Cook is not the foundation of this action. The slander was proved by other witnesses as to whom no privilege is claimed. It was then shown by Cook that subsequent to the speaking of the slander, Bircher attempted to have Gruaz indicted. We cited numerous authorities in our brief (page 15), to the effect that it was proper in such cases to show an attempt to indict. The evidence of Cook may not by itself been sufficient to support the action. But it was at least admissible to show that the defendant was persisting in his charges and attempting to procure an indictment. It was properly admissible, with the qualification as to good faith.

Words spoken to a magistrate in the course of a judicial proceeding, though slanderous and malicious, are not actionable. If, however, the slander is proved *aliunde*, they may be given in evidence to aggravate the damages.

Gosslin vs. Cannon, 1 Harrington, (Del.), 3.

In the second place, it is not the duty of the State's attorney in Illinois (as is the case in some of the States) to receive complaints as to offenses. Such complaints the law provides shall be made to a magistrate as to the grand jury. Bircher wanted Gruaz indicted. His proper course was to go before the grand jury. Under the law, the State's attorney had no jurisdiction or authority over the matter until after the presentment to the grand jury. His duties begin only after a charge has been made before the proper officer or body designated by law to receive such complaints and not before. If, after indictment found, the communication had been made, or being the facts in the case, it may be that it would have been privileged. But here no proceeding was pending, and none was ever instituted. All that was done was the communication to Cook and to the grand jury, and there never was occasion for the State's attorney to take charge of the prosecution.

We may admit that everything done in the course of a judicial proceeding is absolutely privileged. But the act thus sought to be excused must have been done as one of the *steps* of the proceeding. The complaint must be to one who has authority to *act* upon the complaint. If made to a magistrate who has authority to issue a warrant, or the grand jury, who may present an indictment, then it is done in a judicial proceeding. But the prosecuting attorney here had no power to act upon the communication made to him. He could only do as any other individual might have done, refer the party to the proper tribunal, the grand jury. The complaint to Cook was not for the purpose of setting the machinery of the law in motion, because Cook had no authority or power to act in the premises. Hence it was not unconditionally privileged.

Townsend on Slander, Secs. 220 to 224.

When complaint is made to one who has the power to *act* upon the information, then it may

properly be held to have been given in a judicial proceeding. The remedy for a wrongful complaint is then for malicious prosecution. But there was no such remedy here, as no prosecution was in fact instituted, and the complaint to Cook was not the commencement even of a prosecution. There is, therefore, no remedy except for slander.

The proposition that such a communication is unconditionally privileged is simply monstrous. That a party may, *without any intention even of instigating a prosecution*, go from one public officer to another under the false pretense of seeking to redress a public wrong, and charge another with crime, destroying his reputation, and be protected by the shield of the law on the ground that such communication is privileged, regardless of good faith or the circumstances, is a principle we believe will never receive the sanction of this Court.

In Townsend on Slander, cited in our brief (pages 8 and 9), a contrary rule is announced, and one in accord with the ruling of the Court below. The authorities are then cited and discussed, and no apparent conflict even exists among them.

The rule is also accurately stated in Eames vs. Whittaker, 123 Mass., 342, as follows:

"Upon grounds of public policy, communications which would otherwise be slanderous, are protected as privileged, *if they are made in good faith*, in the prosecution of an injury regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal."

In also Hilliard on Tests, Vol. 1 page 317, et seq.

Of the cases cited by counsel on this point, but one only would seem to give countenance to their position—Oliver vs. Pate, 43 Ind., 132. The part of the decision quoted was not necessary to the decision of the case, as the evidence was admitted on another ground, and is therefore mere *dictum*. And in

that case even, the Court does not decide that the question of good faith is not material. That question was not raised, and was not discussed. In that case also a prosecution was actually instituted. The prosecuting attorney drew up the complaint, and therefore *acted* on the information given. He had power to act, and did act, and thus set the machinery of the law in motion. In a later case in the same Court (State vs. Van Buskirk, 59 Ind., 384), the Court permitted the prosecuting attorney to testify to statements made in his presence by a witness to the grand jury.

2. It is next alleged that if only the communication was but conditionally privileged, the charge of the Court ignores the element of probable cause. What has already been said and cited applies with great force to this objection. The authorities cited show that the question is one of *good faith*. The communication to the grand jury was not one of the steps in a judicial proceeding, and cannot therefore be called malicious prosecution, or be analogous to it.

But it is not true in fact that the charge of the Court ignores the element of probable cause. The charge is that the jury shall disregard the testimony if made in good faith, and with honest motives. Does not this include want of probable cause? If made with probable cause, the jury could not believe it was made in bad faith and with dishonest motives.

"So complaints against an individual for alleged offenses, *honestly* performed before a judicial officer, will not render the complainant liable for slander, and every such complaint is to be deemed *prima facie* honest, and to have been made upon good motives. But the question of malice, in such cases, is always an open question, and may be proved either by express evidence or attending circumstances. *And complaints are actionable, if made with no bona fide intention of prosecuting.* So libel-

ous charges made before a court not legally competent to investigate them are actionable."

Hilliard on Torts, Vol. I., page 319.

Plaintiff in error cannot complain that the charge was not as full as desired, no request for a charge being made.

Express Co. vs. Kountz, 8 Wall., 342.

II.

The second point, that there was error in the admission of evidence as to special damages and in the charge in reference thereto, may be dismissed with the statement of the fact that no exception was taken to the admission of such evidence or to that portion of the charge of the Court. We again cite

Railway Co. vs. Twombly, 100 U. S., 78.
Evanston vs. Gunn, 99 U. S., 665.
Belk vs. Meagher, 104 U. S., 279.
Clark vs. Fredericks, 105 U. S., 4.
Edwards vs. Elliott, 21 Wall., 532.

III.

It is next claimed that the suit abated upon the death of the defendant, and the Court had no power to enter judgment *nunc pro tunc*. It is first shown by counsel that the action did not survive at common law, and is not made to survive by statute; and also that the Act of 17 Car. II., Sec. 1, is not in force in Illinois, all of which we are free to admit. We rest the question solely upon the practice at common law.

The case of Murphy vs. McGrath, 79 Ill., 594, which is cited, was an action of trespass, which is made to survive by statute, and so the Court decided. But when the Court incidentally added that at common law the suit would have abated, the expression was mere *dictum*, that question not being before the Court. What the Court said was strictly accurate so far as saying that the action would have abated at common law. But the Court does not decide, nor is it called upon to say whether a judgment *nunc pro tunc* might not be entered in such case and avoid the abatement.

Reference is made to a few only of the cases cited by us, and effort is made to distinguish them from the case at bar. It is said that under the practice in Illinois, "the defendant had a clear legal right to make this motion, and have it heard and decided, before judgment should be entered against him." So far as the foregoing means a *final* judgment, it is correct.

Under the practice in Illinois the Court may enter judgment upon the coming in of the verdict, but this is subject to be superseded by a motion for a new trial made during the same term. If a motion for a new trial is made no *final* judgment is entered until that is disposed of. The practice in Ohio, as disclosed in the case of Dial vs. Holter, 6 Ohio St., 228, is the same. There judgment was entered upon the coming in of the verdict, it is true, but it was not a final judgment; it was superseded by the motion for a new trial; otherwise, why the necessity for entering the judgment *nunc pro tunc*, years after the verdict was rendered?

Judgment may or may not be entered upon the coming in of the verdict. If a motion for new trial is made the same term, the previous entry of judgment amounts to nothing, as it does not become final until the motion is overruled.

Hearson vs. Grandine, 87 Ill., 116, 120.

The conclusion reached by counsel after review-

ing a portion of the authorities is that a judgment *nunc pro tunc* may be entered when the delay is the act of the Court, but not when it is the act of the adverse party.

But the delay here *was* the act of the Court. The judgment recites that the hearing was postponed "to a *convenient* day of the term." It is not postponed at the instance of the parties, or to suit *their* convenience. No motion was made by either party for such postponement. The proper construction of the order is, that it was postponed to suit *the convenience of the Court.* It may be said that the record does not in express terms show the cause of the delay. But all intendments are to be taken in favor of the validity of the act of the Court. The construction most favorable to the regularity of the judgment should be adopted.

But whether the delay in entering final judgment was caused by the act of the Court or of the adverse party, it is clear that at common law the Court properly entered judgment *nunc pro tunc.* And the fact that the motion had not been *argued* at the time of death makes no difference.

Freeman on Judgments, Sec. 58, and cases cited (see former brief, p. 17).

The case of *Currier vs. Lowell*, 16 Pick., 170, presents a complete answer to all the objections made. We quote from the decision of the Court:

"In regard to the motion of the defendant to dismiss the action on the ground of the death of the plaintiff, we think the law upon this subject is well stated in Tidds' Practice, 93.

"*At common law*, the death of a sole plaintiff or defendant, before final judgment, would have abated the suit; but as the judgment relates to the first day of the term, if the party be alive after that day, it may be entered, and costs taxed thereon, after his death. * * * And if either party die after special verdict or special case, *and pending the time taken for argument or advising thereon*, or on a motion in arrest

of judgment or for a new trial, *judgment may be entered at common law* after his death, or off the term in which the postea was returnable.

"And although there can be no appearance for the party deceased, yet the Court will hear from any one of its officers as an *amicus curiæ* any suggestions as to the merits (*Isley's case*, 1 Leon, 187). In Oades vs. Woodward, 1 Salk., 87, the attorney for the plaintiff was permitted to enter judgment as of a preceding term, although the party died in vacation. If the party died at the same term at which the suggestion was made, the Court would not take any notice of it, but proceed to enter up the judgment (Crisp vs. Jackson, 1 Sid., 462). The Court will go back to the time when judgment might have been rendered in the verdict, if no motion had been made which prevented it (Tooker vs. Beaufort, 1 Burr., 147. Mayor vs. Berry, 4 Burr., 227)."

"After verdict for the plaintiff and postea returned, and pending a rule to show cause why a new trial should not be granted, but *before argument*, the defendant dies, judgment may be taken for the plaintiff *nunc pro tunc*."

Den vs. Tomlin, 3 Harr 14.

The foregoing disposes of the objection that the motion for a new trial had not been *argued* at the time of defendant's death. The record shows here that the motion was in fact argued by defendant's counsel as *amicus curiæ*. The objection that the hearing of the motion was *ex parte* has no foundation in fact, and should have no weight in law. It is a mere technical objection without a particle of merit. The tendency of modern decisions is not to deprive a party of the fruits of a recovery because of a fanciful or technical objection, having no foundation in fact.

The case of Ireland vs. Champneys, 4 Taunt., 884, which is cited, is not in point, because there the

judgment was not entered *nunc pro tunc*, but as of a day subsequent to the death.

What we have here said is in addition and not as a substitute for our former brief, to which the Court is referred for additional citations on the points discussed.

H. S. Greene,
F. W. Burnett,
For Defendant in Error.

110-311

IN THE No 209

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

JOHN C. VOGEL, Executor of Rudolph Bircher, deceased,
Plaintiff in Error,

vs.

TIMOTHY GRUAZ,
Defendant in Error.

In Error to the Circuit Court of the United States, For the Southern District of Illinois.

BRIEF OF JOHN M. PALMER & JAMES C. ROBINSON,

For Defendant in Error.

IN THE

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BRIEF OF JOHN M. PALMER & JAMES C. ROBINSON,
For Defendant in Error.

Although a number of errors are assigned upon the record in this case, counsel for plaintiff in error do not give equal prominence to each of them.

A reversal of the judgment in the court below is sought upon two general grounds which are so disconnected in a legal sense, as to warrant a separate discussion, though we shall consider but one of them.

The first ground of attack upon the judgment contained in the first, second, and third assignments of errors involves a criticism upon the conduct of the trial judge prior to verdict; the second ground of complaint, which is covered by the fourth and fifth assignments of error, relates to matters subsequent to the verdict.

In this discussion they are thus separated because of the rule of universal application in Appellate courts that only such errors or mistakes of the trial judge during the trial, as the court can see would affect the verdict reached by the jury, will be considered.

The first assignment of error relates to the admission of the testimony of C. L. Cook, the State's Attorney of Madison county, Illinois, and the instructions of the court in respect to the effect to be given to it by the jury.

Counsel for plaintiff in error put their complaint in this form :

"The Court erred in permitting the witness, Cook, to testify as to the consultation between himself as State's Attorney and the defendant, with a view to the prosecution of the plaintiff on a criminal charge, and reveal the statements made to him in such consultation."

An examination of the record will show that Mr. Cook was offered as a witness for the plaintiff, and informed the court, not for the jury, the circumstances under which the statements of defendant concerning which he was about to testify were made, and the court then permitted his evidence to go to the jury, leaving it for the jury to determine whether the statement was made in good faith or not; or in other words, leaving it to the jury to determine whether it was really made with a view to the prosecution of the plaintiff or not. If

this evidence was admissible under any circumstances, it is clear that the trial judge, both in his remarks at the time of its admission, and in his charge upon the subject, controlled the jury properly in its application to the issue for them to try.

But on the trial in the court below the counsel for the defendant placed their objection to the admission of the testimony of Mr. Cook in this form :

"The defendant's counsel objected to the witness testifying to matters disclosed to him by the defendant under the circumstances stated, on the ground that such communications are privileged."

It is well understood that the expression "privileged communication," and the term "privileged," when applied to statements made by one person to another, have according to the circumstances under which they are used, at least two widely different meanings.

One illustration, or example of this is found in what may be called the law of evidence, growing out of the relation of attorney and client; and the law upon the subject of privileged communications in this connection has been thus stated by a distinguished judge.

"It is that well known rule of evidence founded upon the confidence which a client reposes in his counsel, attorney or solicitor. By this rule it is well established, that all confidential communications between attorney and client are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased. This privilege is that of the client, and not of the attorney, and never ceases unless voluntarily waived by the client."

Shaw Ch. J. in Hatton v. Robinson, 14. Pickering 416, S C. 25, Am. Decisions, 415.

Though there have been some differences of opinion beween Courts of equal respectability as to the extent and limits of the rule, for the purposes of the case, the rule may be accepted as stated in the case of Hatton vs. Robinson, above cited.

"But the privilege of exemption from testifying to facts actually known to the witness is in contravention of the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to unable the client and attorney to communicate with each other as an interpreter, agent, or attorney's clerk, and this privilege is confined to counsel, solicitors and attorneys, when applied to as such, and when acting in that capacity"

The term "privileged communication," in the other sense above referred to, is applied in the law of slander and libel, not with any reference to the evidence, or the relation of the witness to either of the parties, but as a *defence* to the action.

And in this connection a text writer of established reputation says: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facia* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of

personal spite or ill-will, independent of the occasion on which it was made.'"

Folkard's Starkie on Slander and Libel, Sec. 670.

The only case counsel for plaintiff in error have been able to find which supports their theory, that the statement by defendant to Mr. Cook is to be protected upon the ground that it was in the nature of a communication from client to attorney and thus privileged, is the case of Oliver vs. Pate, 43 Ind., 132.

We have not before us the Statutes of Indiana and are thus not prepared to say what the duties of prosecuting attorneys in that State were at the time this decision was made, but the court will see that the remarks of the judge delivering the opinion, so far as they are copied into plaintiffs brief, were entirely *obiter*, for the testimony objected to was admitted on other grounds.

But aside from that it appears from the report of the case that the relation of attorney and client did in fact, if not in law, exist between the prosecuting attorney and the defendant.

On page 139 of the opinion the court say "One of the attorneys for the appellee in the court below, but whose name does not appear in this court, was prosecuting attorney in Montgomery county, at and before the commencement of the prosecution against appellee. The appellant called upon him as such prosecutor to institute the prosecution against appellee, and, as he testified, made a statement of the facts to him. At his request the prosecuting attorney drew the affidavit upon which the prosecution was based, *and prosecuted the appellee before the Justice of the Peace*, where he was discharged. This action was for that prosecution."

Under such circumstances the Indiana court might well say, "That the prosecutor acts as attorney and receives the communication in that capacity."

Observe, however, the difference between that case and the one at bar.

Mr. Cook was States Attorney of Madison county, and it was not his duty to institute prosecutions, nor to advise with respect to them, but only to prosecute such indictments as might be found by the grand jury.

The defendant applied to him for information as to how he should proceed, and was directed to the grand jury as the proper tribunal to determine whether a prosecution should be instituted, and then Mr. Cook told him that if the grand jury found an indictment he would prosecute it vigorously. Until indictment found Mr. Cook owed no duty to the defendant, and certainly by no possibility could the relation of attorney and client be said to exist.

The case of Worthington vs. Scribner, 109 Mass., 487, referred to by counsel, can have no application here.

The only question there was whether the court would compel the disclosure of certain matters without the consent of the government, to whose officers they were addressed.

Here no such question arises. Mr. Cook was an independent officer having no official superior to consult as to the propriety of his action, and his consent to testify must be regarded as the consent of his government.

We think no case can be found which will bring the statements made to Mr. Cook within the rule in relation to confidential communications between attorney and client.

Counsel for plaintiff in error object to the charge of the Court in defence to the testimony of Mr. Cook, because the instruction "ignores the element of probable cause."

We submit that counsel are mistaken in supposing that the element of "probable cause" as ordinarily understood, entered into the case submitted to the jury.

We may admit, if necessary, that a communication to a public officer made in good faith and upon a proper occasion cannot be made *the ground of an action*, and that the person making such communication under such circumstances, would be protected as well from an action for slander or libel as for an action for malicious prosecution; but this rule is to be applied only when the alleged communication is made the basis of the action.

In this case, the publication of the words spoken and alleged to be defamatory was proven by a number of witnesses, and would have been fully established without reference to Mr. Cook's testimony, and his testimony was admitted as proof of a repetition, under well recognized rules of evidence in this class of cases.

But the rule adverted to by counsel, though stated in a variety of forms, amounts to this:

That where the defence relied on is, that the communication was privileged, if it appear to have been made maliciously, or if evidence